THE LISBON PROCESS REVISITED: EQUALITY POLICIES AND THE EUROPE 2020 STRATEGY

LE PROCESSUS DE LISBONNE REVISITÉ: STRATÉGIE EUROPE 2020 ET POLITIQUES D'ÈGALITÉ

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Embajador República Francesa.

Propos d'ouverture

Chers amis,

Je suis très heureux d'inaugurer à l'Institut français les travaux du groupe de réflexion sur les politiques d'égalité et le processus de Lisbonne. Avec le soutien de la Commission européenne, de l'Université Carlos III et de l'Ambassade de France, c'est un programme ambitieux que vous vous êtes donnés, pendant les cinq années à venir.

Plusieurs raisons me font penser que ces travaux devraient être fructueux et utiles pour l'Europe. D'abord la grande qualité de ceux qui y participeront, juristes et économistes de renom. Ensuite la diversité des pays européens, et donc des philosophies, qu'ils représentent, du nord au sud, de l'Europe continentale et non-continentale.

Et puis il y a une troisième raison: c'est celle du caractère à la fois urgent et vital de votre réflexion. A l'heure où l'on parle beaucoup, peut-être trop, de décadence de l'Europe, s'interroger sur la stratégie UE 2020 c'est se poser la question de la pérennité de ce qu'on appelle le « modèle européen », c'est-à-dire la croissance au service de la cohésion sociale.

Vos travaux s'inaugurent dans une unité de lieu et de temps hautement significative : l'Espagne, à quelques jours de la fin de sa présidence de l'Union européenne. Une présidence doublement historique, pour la crise exceptionnelle qui l'aura marquée, mais aussi pour la portée non moins remarquable des chantiers, à la fois institutionnels, économiques et sociaux, qu'elle aura ouverts.

Cette crise aura eu au moins deux mérites.

D'abord celui de nous interdire de fermer les yeux plus longtemps sur un problème dont nous sommes conscients depuis de nombreuses années: comment revitaliser une économie européenne enferrée depuis vingt ans dans une croissance morose, un chômage endémique et dont seules les inégalités sociales semblent croître? La coïncidence entre la crise et l'arrivée à échéance de la stratégie de Lisbonne aura créé un choc salutaire en obligeant l'Europe à constater qu'elle n'a pas su tenir ses promesses. La « méthode ouverte de coordination », comme on dit en jargon bruxellois, n'a pas fonctionné.

Et un second mérite, peut-être plus précieux encore : celui d'imposer aux Etats membres une coordination, et plus encore une solidarité économique aux forceps. Avec le sauvetage de la Grèce, la mise en place du mécanisme de stabilisation financière, la création du groupe de travail dirigé par M. Van Rompuy, l'Europe a dû se doter d'une ambition et d'une audace bien supérieures à celles que laissait augurer la seule révision de la stratégie de Lisbonne.

Espérons qu'elle saura en tirer parti. Et pour ce faire, des réflexions comme celles que vous entamez aujourd'hui sont indispensables. Car la dimension budgétaire que la crise a revêtue dans ses derniers développements présente un risque: celui de confondre gouvernement économique et discipline des finances publiques. Celui d'oublier qu'au-delà du problème bien réel de la saine gestion, c'est à des choix com-

muns de politiques publiques que nous sommes d'abord confrontés. Parmi ces politiques, celle de l'égalité d'accès des citoyens européens au travail et à la richesse, et donc celles de la formation, de l'emploi et du genre, pour ne citer que celles-ci, occupent une place centrale.

Bon travail et bonne chance!

Nota Introductoria

Esta monografía recoge las contribuciones, debates y conclusiones del Seminario Internacional sobre las políticas de igualdad y el Proceso de Lisboa que se celebró en Madrid el 23 de junio de 2010, dentro del Proyecto de Investigación nº 154460-LLP-1-2009-1-ES-AJM-CL, financiado por la Comisión Europea.

Dicho seminario contó igualmente con el apoyo financiero del Vicerrectorado de Investigación (Proyectos nº 2010/00235/001 y nº 2010/00235/002), y del Vicerrectorado de Igualdad y Cooperación de la UCIIIM, así como con el auspicio de la Embajada de la República de Francia en España.

Participaron como ponentes la Dra. C. Fisher (Presidente de Confrontations Europe), en sustitución y representación del Pr. Dr. Ph. Herzog (Catedrático de la Universidad Paris X-Nanterre, antiguo eurodiputado, Secretario General de Confrontations Europe, y Consejero Personal del Comisario de Mercado Interior, M. Barnier); la Profa. Dra. Dña. Catherine Barnard (Catedrática de Derecho de la Universidad de Cambridge- Reino Unido, y Catedrática J. Monnet); el Prof. Dr. Reiner Grote (Profesor Agregado del Max Plack Institut für Comparative Public Law and International Law de la Universidad de Heidelberg, R.F. de Alemania); y, la Profa. Dra. Dña. Karolien Pieters (Investigadora Principal del T. M. C. Asser Institut de la Haya, Países Bajos).

Las Sesiones de trabajo fueron inauguradas con una intervención del Excmo. Sr. D. Bruno Delaye, Embajador de la República Francesa, y, actuó como moderador y relator general de las mismas el Prof. Dr. Carlos J. Moreiro González (Catedrático de Derecho Internacional Público, Universidad Carlos III de Madrid, y Cátedra J. Monnet ad personam de Derecho de la UE).

El Seminario se celebró a puerta cerrada, asistiendo a las sesiones de trabajo los citados ponentes y un reducido grupo de diplomáticos y profesores de la Universidad Carlos III de Madrid.

Previamente se abrió un foro digital con una amplia participación, así como un plazo para la presentación de comunicaciones.

Las conclusiones provisionales del seminario se difundieron el 24 de junio de 2010 mediante su retransmisión audiovisual desde el Campus de Getafe de la Universidad Carlos III de Madrid.

Dichas conclusiones provisionales se estructuran en dos categorías. Por un lado, las que se refieren al marco económico y social en que actualmente se diseñan las políticas públicas de la UE, que están urgidas por la consecución de resultados eficaces en el corto plazo

Por otro lado, las que tienen que ver de una manera más concreta con los elementos jurídicos que soportan y desarrollan la elaboración de las políticas de igualdad dentro del Proceso de Lisboa, y de su actualización en la Estrategia Europa 2020, adoptada por el Consejo Europeo en marzo de 2010.

A) Las políticas públicas europeas en un contexto de recesión económica.

Las conclusiones en este ámbito, las más extensas y sugerentes, desarrollan la ponencia de los Prof. Dña. C. Fisher y del Prof. Dr. D. Ph. Herzog.

1. Deben de integrarse de una manera mucho más proactiva en la configuración de las políticas públicas supranacionales a los actores sociales no gubernamentales, no sólo sindicatos y empresarios, sino también las fundaciones, asociaciones y entidades que, por razón

de su composición transnacional y de su marcado carácter especializado, tienen relevancia suficiente para poder influir en la toma de decisiones por los órganos e instituciones competentes de la UE y de sus Estados miembros.

2. Debe reforzarse el método supranacional para garantizar dos elementos transcendentales en la implementación de las políticas regulatorias que faciliten la salida de la recesión en Europa: por un lado, el liderazgo de la Comisión Europea para definir el interés público de la Unión y los umbrales mínimos desde los que referenciarlo; por otro lado, la legitimidad democrática que supone la adopción por el Parlamento Europeo y el Consejo de Ministros de dichas medidas, así como la capacidad coactiva propia de los actos supranacionales.

3. Deben modificarse los Tratados para adecuar el ámbito de competencias de la Unión, mediante una transferencia desde los Estados miembros en todos los sectores que requieren la regulación del mercado por los poderes públicos para garantizar su eficiente funcionamiento.

4. Debe de constituirse un club europeo de inversores que financien proyectos de creación de riqueza (Bancos de desarrollo local y regional, clústeres, etc.) e infraestructuras a largo plazo.

5. Deben de reformularse los procesos de formación profesional y de la educación en sus diversos grados en Europa, a efectos de poder integrarlos plenamente en un espacio común, inspirándose en este sentido en la transferencia de créditos ECTS del Proceso de Bolonia.

6. Debe de crearse un registro europeo de bienes públicos comunes y garantizarse su tutela por todos los poderes públicos (por ejemplo, grandes interconexiones ferroviarias; grandes sistemas de provisión de energía; autopistas digitales; etc.)

7. Debe de completarse el mercado interior en lo relativo a la libre prestación de servicios y a la libre circulación de trabajadores.

8. Debe de reformularse la noción de renta básica de ciudadanía para que pierda su carácter pasivo y se convierta en un aval económico de los poderes públicos nacionales para evitar situaciones de desintegración social de las personas, mediante la proporción de estímulos a la formación profesional, la creación de empresas, etc.

B). En lo que concierne a las medidas estrictamente jurídicas relacionadas con la implementación de las políticas de igualdad, se han consensuado, sobre la base de las ponencias de las/os Profs. C. Barnard, K. Pieters y R. Grote, las siguientes propuestas:

1. Prescindir de las previsiones difusas y sustituirlas por mandatos claros de actuación y de reconocimiento de competencias a la UE en el Tratado de la Unión y en el Tratado de Funcionamiento de la Unión.

2. Utilizar, en la menor medida posible, los instrumentos de "soft law", y utilizar mayoritariamente instrumentos normativos o coactivos como Reglamentos y Directivas.

3. Perfilar claramente la obligación de todos los Estados miembros de lograr indicadores idénticos en ámbitos de la igualdad que no están siendo correctamente regulados, como es el caso de las políticas de conciliación laboral.

En este sentido, se deben atribuir plenos poderes de supervisión a la Comisión Europea y, en su caso, capacidad de propuestas de sanción supranacional a aquellos Estados miembros que no garanticen la plena implementación de dichas políticas.

4. Integrar las fórmulas "nórdicas" de gestión corporativa, de tal manera que se penalice o se dificulte gravemente la creación y el funcionamiento de las sociedades cotizadas en cuyo Consejo de Administración no figure un número relevante (igual o superior a la mitad de sus miembros) de mujeres.

5. Similarmente, debe mejorarse la coordinación de los mecanismos e instrumentos de la Unión Europea (Pymes, I+D, Igualdad, etc.) para garantizar el liderazgo empresarial de las mujeres, así como la creación de viveros en el marco de las relaciones universidad-empresa.

1. Ponencia Ph. Herzog

L'Europe sociale: Une dimension strategique de la sortie de crise

L'avenir est incertain pour l'Europe sociale, car nous ne sommes toujours pas sortis de la crise économique et financière.

Au début de l'année 2010, une action coordonnée a été nécessaire pour garantir le financement de la dette souveraine grecque, mais l'inquiétude demeure car la restructuration des dettes publiques et des actifs bancaires est loin d'être terminée. Une rechute dans la récession est possible.

L'hypothèse la plus réaliste est une croissance durablement lente et chaotique en Europe... à moins que nous ne parvenions à combiner les mesures de «stabilité financière et budgétaire» et les politiques nécessaires pour construire une nouvelle croissance durable. Pour cela, une coopération permanente et assidue entre les États membres est nécessaire, ainsi qu'une consolidation de l'UEM avec un « fédéralisme fiscal », comme Jean-Claude Trichet l'a lui-même récemment évoqué.

Dans ce contexte, le renouveau de l'Europe sociale ne doit pas être perçu comme une contrainte, mais comme un défi à relever pour que les citoyens contribuent à une croissance plus économe en ressources naturelles, fondée sur des investissements à long terme et de nouveaux biens publics.

Cela signifie que l'endettement pour la consommation aura un rôle plus limité et que le développement des compétences humaines pour l'innovation et pour des emplois de meilleure qualité sera valorisé.

Des opportunités à saisir pour redéfinir l'Europe sociale

Nous regrettons que la nouvelle Stratégie Europe 2020 ait été mise au point par la Commission sans consultation digne de ce nom. Nous regrettons également l'absence des moyens et incitations nécessaires pour réaliser ses objectifs. Les leçons de l'échec de la Stratégie de Lisbonne n'ont pas encore été tirées. Néanmoins, malgré le caractère informel de la Stratégie Europe 2020, ces objectifs sont intéressants[130]. Quatre des dix « directives intégrées » sont consacrées à des avancées sociales: faire passer le taux d'emploi à 75 % ; développer les capacités humaines dans la perspective de nouvelles compétences et de nouveaux (et meilleurs) emplois ; améliorer la qualité et l'efficacité des systèmes d'éducation et de formation à tous les niveaux ; faire baisser le nombre d'Européens sous le seuil de la pauvreté de 25 %. Mais comment?

Souvenons-nous que l'essor de l'Europe sociale sous la présidence de Jacques Delors était lié à la construction du Marché unique. Il y a trois ans, j'ai proposé un projet de nouvel Acte unique pour redonner de l'élan

130. http://ec.europa.eu/eu2020/index_fr.htm

à l'Union[131]. Les citoyens européens ne sont pas satisfaits du marché intérieur, et l'assentiment collectif fait souvent défaut. L'objectif est donc d'établir un nouveau compromis afin de donner à l'approfondissement de ce marché, qui demeure très fragmenté et incomplet, une « nouvelle dimension sociale » tout en renforçant son efficacité.

J'en ai discuté avec Mario Monti et Michel Barnier. Aujourd'hui, Mario Monti a présenté un rapport à J.M. Barroso pour demander une nouvelle stratégie[132]. Le commissaire Michel Barnier a déclaré que la Commission préparerait un nouvel Acte unique (sans modification du Traité cette fois); ce projet fera l'objet d'une communication en octobre 2010. Le degré de résistance des Etats-membres sera à la mesure des enjeux, mais c'est une belle opportunité à saisir.

La dimension sociale de la Stratégie UE 2020 ne peut être induite par le renouveau du marché uniquement; elle a besoin de financements. Le président Van Rompuy va proposer un renforcement du « gouvernement économique européen », ce qui pourrait donner plus de poids au principe de solidarité récemment intégré au Traité de Lisbonne. Les stratégies de gestion des finances publiques nationales et européennes pourraient prendre en compte l'importance de l'investissement social comme facteur clé de la croissance. Mais les résistances des nations à coordonner leurs budgets et à former un véritable Budget européen devront être vaincues.

Nous aimerions faire quelques suggestions sur la manière de tirer le meilleur parti de ces opportunités. Elles sont fondées sur deux objectifs sociaux majeurs qui peuvent intéresser l'ensemble des Européens.

131. Un nouvel Acte unique pour relancer l'Europe, 15 janvier 2007, disponible sur le site www.confrontations.org

132. Une nouvelle stratégie pour le marché unique, http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_fr.pdf

Premièrement, le développement des capacités humaines, avec l'ambition de parvenir au plein emploi à long terme, est une composante essentielle d'une stratégie de compétitivité et de croissance efficace. Cela signifie réhabiliter les valeurs du travail et de la formation. Il faudra vaincre les résistances considérables à l'encontre de la mobilité et faire de celle-ci l'espérance d'un meilleur emploi ; il faudra concilier la protection des travailleurs et la liberté de la prestation de services. L'Europe devra sécuriser la mobilité transfrontières dans un marché du travail européen organisé, donner une dimension européenne à l'éducation et la formation, concevoir une implication dynamique des personnes âgées dans la société.

Deuxièmement, il faut promouvoir les biens publics européens. Les Traités prévoient que les nations ont toute compétence en ce domaine, sous réserve que la concurrence ne soit pas entravée. L'Union autorise des exemptions aux règles du marché, sous son contrôle. Mais il n'existe aucun droit positif commun sur les services essentiels, et jusqu'à récemment, l'Union ne s'estimait pas responsable de la prestation de tels services Elle adhère aux «quatre libertés» inscrites dans le Traité de Rome, et l'on parle d'une cinquième liberté, la liberté d'information. Mais les conflits majeurs entre les libertés économiques et les droits sociaux perdurent. Des arbitrages politiques sont nécessaires, et l'accès des citoyens à des infrastructures européennes de services d'intérêt général offrirait des solutions nouvelles. Le Traité de Lisbonne (article 14) établit une coresponsabilité entre les États et l'Union pour garantir les conditions d'accès aux services d'intérêt général: c'est un changement historique, mais il appelle maintenant une volonté politique pour traduire cela en actes.

Développer les capacités humaines et créer un marché du travail européen

Nouvelles compétences associées à de nouveaux emplois

Les sommes d'argent dépensées pour préserver les emplois et financer les indemnités de chômage ont permis de limiter l'impact de la crise, mais sachant qu'il n'y a pas de forte reprise économique à l'horizon, que faire?

Alors que le chômage et les suppressions d'emplois augmentent, nous devrions faire tout ce qui est en notre pouvoir pour préparer les gens à de nouveaux emplois. Toutes les catégories de population sont concernées: les jeunes qui n'ont aucune formation professionnelle ; les adultes qui, bien souvent, ont besoin d'une remise à niveau de leurs compétences ; et les travailleurs âgés, en particulier les cadres dirigeants, qui devraient participer à la formation des nouvelles générations arrivant sur le marché du travail.

D'importants problèmes sociaux et culturels sont à résoudre. Comment pouvons-nous conseiller aux jeunes de devenir des ingénieurs ou des techniciens qualifiés alors que les seuls modèles que nous leur présentons sont des footballeurs, des mannequins ou des traders ? Si nous échouons à les motiver, il n'y aura pas de regain d'intérêt pour les carrières scientifiques, technologiques, et industrielles.

Pour combler le fossé entre éducation et emploi, il faut susciter l'implication et la coopération des principaux intéressés. Cela doit se faire dans chaque secteur et nécessite également une collaboration intersectorielle. Il s'agit d'organiser systématiquement les coopérations entre les acteurs publics et privés. Cette stratégie doit être organisée sur les territoires, afin de gérer au plus près les transitions professionnelles et industrielles, et en faisant appel à des coopérations transfrontières à grande échelle.

Prétendre que l'Union européenne ne dispose pas des compétences requises pour agir ainsi en matière de formation et d'emploi est une mauvaise excuse pour la passivité. Nous nous plaignons que la Stratégie Europe 2020 n'est qu'une déclaration d'objectifs, mais pourquoi

ne pas chercher des moyens pour les réaliser? Par exemple, l'initiative «De nouvelles compétences pour de nouveaux emplois» mérite un soutien et des actes. La Commission souhaite la déployer dans tous les secteurs et toutes les régions, avec la participation active de parties prenantes partageant des projets concrets. De mes discussions avec la Direction générale Emploi et Affaires sociales, j'ai retenu que les fonds sociaux européens sont re-nationalisés, alors qu'ils pourraient servir d'incitations communautaires pour le développement des compétences. Le Fonds européen d'ajustement à la mondialisation pourrait être revu à la hausse et réorganisé pour servir cette initiative. Les fonds d'investissement pourraient servir à financer le développement des capacités humaines. Le principe de solidarité devrait conduire à allouer des aides importantes à la formation professionnelle dans les nouveaux États membres, où elle est très faible: la Commission pourrait proposer des programmes de formation ciblés et spécifiques.

Vers un marché du travail européen

L'accent sur la mobilité en matière de formation et d'emploi soulève la question majeure de la flexibilité du marché du travail.

Le concept de flexicurité est déficient; nous pourrions le clarifier et aller plus loin vers une problématique de politiques de marchés transitionnels du travail[133], en nous assurant que les gens reçoivent une formation et un accompagnement pour trouver un nouvel ou un meilleur emploi. Les écoles et les universités pourraient être encouragées à se concentrer sur les perspectives de carrière des étudiants sur le marché du travail, comme elles tentent déjà de le faire. Pour favoriser la transition des travailleurs vers des emplois plus qualifiés, des programmes

133. Gazier Bernard, « Transitional Labour Markets: Wages and Financing » (Marchés du travail transitionnels: salaires et financement), contribution à la conférence « New institutional arrangements in the labour market » (Nouveaux arrangements institutionnels sur le marché du travail), European Academy of the Urban Environment, Berlin, 11 et 12 avril 1997.

de formation spécifiques seraient organisés au niveau régional. Ceci nécessite d'anticiper et de gérer les processus de restructuration en conjonction avec l'ensemble des parties prenantes[134].

L'Union pourrait donner l'exemple en organisant la mobilité transfrontalière. Le marché du travail européen est un objectif commun depuis l'Acte unique de 1986, mais le processus est extrêmement lent.

L'Union tente d'établir des équivalences entre les diplômes et les qualifications. La portabilité des droits pour faciliter la mobilité transfrontières progresse également. Mais un obstacle majeur subsiste: plusieurs pays ne transposent pas les mesures européennes. La Commission devra se doter de moyens de surveillance et de mise en application. Les gens ont besoin d'infrastructures qui leur permettent d'avoir accès aux informations et à un accompagnement pour leurs mobilités. EURES est déjà un lien entre les services publics nationaux et locaux pour l'emploi, coordonné par la Commission. Il met des informations en ligne. Depuis la crise, davantage de personnes appellent. Quelques réseaux transfrontaliers impliquant les partenaires sociaux ont été établis. Mais l'efficacité de ces instruments n'est pas évaluée, les ressources sont très limitées, et aucune incitation n'est fournie. Un développement important de ces outils est nécessaire.

Comme nous le savons tous, le conflit entre la liberté de la prestation de services et la protection des droits nationaux en matière d'emploi est l'un des principaux obstacles à la mise en œuvre de la directive « services ». Fondée sur le principe du pays d'origine, elle permet aux autorités du pays hôte de choisir les normes sociales qu'il souhaite

134. Fernando Vasquez, « Social partners and civil society participation: anticipation of change and coordination of the Union's policies » (Partenaires sociaux et participation de la société civile : anticipation de l'évolution et de la coordination des politiques de l'Union), in Looking for the European Interest (À la recherche de l'intérêt européen), ouvrage collectif dirigé par Philippe Herzog, Confrontations Europe, Éditions le Manuscrit www.manuscrit.com, Paris, 2008.

conserver, à partir d'une liste exhaustive qu'elles ont prédéfinie. En cas de litige, la Cour de justice tranche généralement en faveur de la libre circulation des services. La directive relative au détachement des travailleurs n'a pas été amendée, car il n'a pas été possible de parvenir à un consensus. Le Parlement européen n'est pas d'accord avec la Cour de justice et, dans une résolution publiée le 22 octobre 2008, il a demandé à la Commission de rédiger un projet de législation sur les conventions collectives transnationales. C'est une proposition de bon sens, mais les partenaires sociaux européens l'écouteront-elle? L'eurodistrict, entité administrative transfrontalière, est un bon exemple de fonctionnement possible d'une négociation multinationale de convention collective.

Des lignes directrices relatives à la rémunération sont également nécessaires. Nous devons enrayer la tendance à la hausse du nombre de travailleurs pauvres, et redonner une possibilité d'améliorer l'échelle salariale en rapport avec l'élévation du niveau des qualifications. Les indicateurs de performance au niveau des entreprises et des branches devraient recréer un lien entre rémunération et productivité. Et, faute d'une harmonisation générale, la coordination fiscale est une nécessité (comme Mario Monti l'a souligné). Pourquoi ne pas donner priorité au principe qui consiste à taxer les revenus financiers au même niveau que les salaires? La suppression des paradis fiscaux est essentielle, et des incitations relatives à l'impôt sur les bénéfices doivent être mises en place pour encourager la formation et l'investissement.

Il va sans dire que des changements sont également nécessaires dans le secteur public, ne serait-ce qu'au nom de l'équité. La restructuration et la mobilité concernent aussi les fonctionnaires, c'est un sujet complexe et d'actualité!

Anticipation des restructurations, renouveau du dialogue social, et politiques industrielles

Les politiques de marchés transitionnels du travail ne peuvent fonctionner que si les opérations de restructuration ont des conséquences positives plutôt que destructrices. La réduction des coûts et des emplois doit être compensée par l'innovation, la diversification et le développement de nouveaux produits et services. Et pour cela, l'implication et l'autonomisation des parties prenantes sont la meilleure solution.

L'Allemagne a des résultats positifs en matière de restructuration parce que les syndicats et la direction anticipent et gèrent ensemble les mutations. Les programmes de relocalisation de l'industrie dans les nouveaux États membres de l'Est ont été accompagnés d'une consolidation de la base industrielle domestique. L'Allemagne garde le contrôle de ses chaînes d'approvisionnement, créant ainsi de la valeur dans ses industries clés (la situation est moins bonne pour les services aux consommateurs). Les pays scandinaves connaissent également le succès, à leur manière. Mais de nombreux autres pays ont été sévèrement touchés. Le niveau d'anxiété sociale est élevé dans l'industrie française; et en Europe de l'Est, la crainte délocalisations industrielles vers la Turquie et l'Asie est omniprésente.

Il est donc temps de renouveler le dialogue social et les politiques industrielles.

En ce sens, Peter Scherrer, secrétaire général de la Fédération européenne des métallurgistes, a suggéré d'instaurer un Conseil de l'industrie automobile européenne[135]. Pendant longtemps, le secteur n'a pas su se préparer pour l'avenir, il souffre aujourd'hui de surcapacités. Des initiatives intéressantes sont finalement en marche pour concrétiser le passage aux voitures propres (ce qui nécessitera de créer des infrastructures pour les recharges électriques et s'accompagnera d'innovations dans les services de transport). Cela devrait donner lieu

135. http://www.emf-fem.org/Press/Press-releases/Special-EU-council-to-tackle-crisis-in-the-European-automotive-industry.

à un dialogue social sectoriel étendu. Dans l'industrie de l'habillement et du textile, les partenaires sociaux européens ont convenu d'un plan d'action européen remarquable qui, malheureusement, ne peut être mis en œuvre à cause des divisions entre les États membres.

Le dialogue social au sein des sociétés européennes doit également être renforcé. Un renouveau managérial est engagé avec les problématiques de responsabilité sociale et environnementale des entreprises ; ceci est positif et devrait être généralisé. L'objectif n'est pas d'introduire une législation, mais d'élaborer des conventions d'entreprise visant à transformer les intentions en actions. Les grandes entreprises le font déjà, notamment dans le cadre des comités d'entreprise européens. Le récent accord sur la gestion négociée des changements dans le groupe Arcelor-Mittal est particulièrement intéressant[136], car il combine une approche conjointe de l'investissement, de la formation et de l'emploi, et des négociations concrètes sur les licenciements, la création d'emplois et le pouvoir d'achat. Dans la même veine, l'accord conclu par le groupe Thalès prévoit l'organisation complète de la formation et des transitions entre éducation et emploi[137]. La Commission, le Conseil et les dirigeants des principaux groupes pourraient témoigner de leur motivation sociale en unissant leurs efforts et en menant campagne pour le développement de ces partenariats.

L'industrie devrait être le souci de tous

Le marché intérieur est essentiellement perçu par les travailleurs comme un espace de concurrence, et non de développement.

136. L'accord a été signé par Arcelor-Mittal et la Fédération européenne des métallurgistes le 2 novembre 2009 (disponible à l'adresse http://www.eurofound.europa.eu/eiro/2009/11/articles/eu0911029i.htm).

137. L'accord a été signé par le groupe Thalès et la Fédération européenne des métallurgistes en juin 2009 (disponible à l'adresse http://www.eurofound.europa.eu/eiro/2009/11/articles/eu0911029i.htm).

Or si la politique de concurrence est nécessaire, elle peut être unilatérale si elle n'est pas associée à des politiques industrielles[138]. Protéger les spécialisations et les avantages comparatifs de chaque État membre est indispensable, et d'ailleurs chaque État vient en aide à « ses » propres entreprises. Mais la concurrence excessive entre les États et l'absence de coopération entre les entreprises vont à l'encontre de l'intégration et de la synergie européennes. Les États membres devront abandonner la doctrine dangereuse des champions nationaux et s'efforcer de partager un intérêt européen commun.

Depuis 2004, la notion de politique industrielle européenne n'est plus taboue. La doctrine précédente de l'Union était purement « horizontale » (aucune intervention dans les entreprises ou même les secteurs, sauf dans des circonstances exceptionnelles). Aujourd'hui, l'Union adapte son approche horizontale à des situations sectorielles spécifiques. Des groupes consultatifs sont créés, composés d'acteurs de la vie économique et sociale, d'organismes publics et d'associations, afin de procéder à un diagnostic commun et d'identifier les points forts et les points faibles d'un secteur donné. Les propositions des groupes sont soumises à la Commission puis au Conseil Compétitivité. L'échec fréquent de ces initiatives est dû à l'incapacité des États membres à surmonter leurs différences. En ligne avec les objectifs de la Stratégie Europe 2020, il est essentiel de mettre un terme aux exigences d'unanimité.

Permettre un accès total aux petites et moyennes entreprises sur le marché intérieur et pour l'innovation est indispensable. Lionel Stoleru a fait des propositions pour un Small Business Act, qui intéressent

138. Guersent Olivier, « Competition and competitiveness policy, the internal market model and the external dimension » (Politique de la concurrence et de la compétitivité, le modèle du marché intérieur et la dimension extérieure), in Looking for the European Interest (À la recherche de l'intérêt européen), Confrontations Europe, Éditions Le Manuscrit, 2008.

les millions de sociétés livrées à elles-mêmes sur le grand marché[139]. L'ouverture des marchés de moyenne et haute technologie et de l'innovation aux PME, avec des opportunités d'accompagnement et de partenariat, serait une grande avancée.

Les biens publics européens sur le marché

En France, le marché unique est perçu comme une menace pour les services publics. En Allemagne, il est perçu comme une menace pour l'administration locale des services d'intérêt général. Aux Pays-Bas, pays traditionnellement plus libéral, l'opinion publique s'est opposée à une intervention de la Commission qui remettait en cause les conceptions hollandaises du logement social.

Depuis le Traité de Rome, le cadre juridique européen est fondamentalement hybride : les États membres sont libres de définir les missions et d'organiser tous les services d'intérêt général. Toutefois, dans les situations où ces services sont considérés comme « économiques », ils doivent respecter les lois de la concurrence, sauf dérogation contrôlée par la Commission. La confusion est générale car les services d'intérêt général, comme tous les biens publics, répondent aux préférences collectives tout en possédant une dimension économique. La Commission se réfugie derrière un droit contestable et parfois inapplicable pour procéder à des arbitrages dont la légitimité n'est pas toujours évidente.

139. Rapport de Lionel Stoleru sur le Small Business Act, avril 2008. Voir aussi « Rapport sur la mise en œuvre du SBA », document de travail de la Commission, 15 décembre 2009, http://ec.europa.eu/enterprise/policies/sme/small-business-act/.

Dans les dix dernières années, la majorité du Parlement européen, dont j'ai été le rapporteur[140], demande pour un nouvel équilibre entre les forces du marché et les services d'intérêt général, fondé sur une législation. Le Traité de Lisbonne respecte notre souhait : il prévoit que le législateur établisse les principes et conditions nécessaires à la prestation des services d'intérêt général. Ce qui veut dire que les responsables politiques et non plus la seule Commission doivent assumer les principes d'arbitrage au niveau de l'Union.

Mais nous ne devons jamais oublier que l'Europe est divisée. De nombreux pays préfèrent protéger la liberté nationale et locale d'administration plutôt que de partager des principes et des conditions ! Accepter les deux, la liberté et le partage de biens publics, voici un enjeu politique majeur pour la Communauté, au cœur du renouveau du marché intérieur.

Je ne pense pas qu'il serait judicieux de commencer par une loi-cadre, c'est-à-dire d'emblée des négociations juridiques longues et complexes; il faut d'abord éclairer la diversité des situations des pays, les comparer, inciter à coopérer, et la législation sera une dimension d'un plan d'action politique.

À cet égard, voici nos recommandations:

- des travaux de nature juridique fondés sur l'article 14 sont nécessaires ; ils doivent prendre en considération tous les biens publics et viser à surmonter la distinction entre services économiques et non économiques ;

140. Rapport sur le Livre Vert sur les services d'intérêt général, 2004. (COM(2003) 270 – 2003/2152(INI)) - http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2003-0484+0+DOC+XML+V0//FR

- une étude comparative des différentes réalités nationales et locales doit être organisée et mener à l'identification de bonnes pratiques ;

- un compromis positif en faveur de la liberté d'administration régionale et locale, en particulier pour les « services sociaux », associé au développement de la coopération transfrontalière, serait fortement apprécié ;

- la diversité des modes opérationnels devrait être soulignée et mise en valeur ;

- la réglementation des réseaux de services d'intérêt général devrait être révisée de manière à garantir la liberté d'accès à tous et dans de bonnes conditions ;

- des programmes européens de promotion des services transfrontières d'intérêt européen devraient être développés à grande échelle (notamment pour l'emploi, la formation, la mobilité durable...) ;

- l'Union sera responsable de l'organisation et de la régulation d'infrastructures de services d'intérêt général européens (services ferroviaires pour les marchandises, gazoducs, etc...).

Une Europe sociale nécessite de nouvelles politiques de financement

Il est évident que la crédibilité de l'Europe sociale, et par conséquent de l'Europe politique, dépend de la réforme financière.

Les nouvelles réglementations au niveau de l'UE et du G20 ont pour objectif d'éviter de nouvelles crises systémiques. Elles doivent mettre un terme aux subventions implicites considérables dont bénéficient les institutions financières et au poids excessif du secteur financier qui épuise l'économie réelle ; elles doivent également établir la partici-

pation du secteur financier dans la prise en charge du coût de la crise économique. Pour cela, de nouvelles règles sont nécessaires ; mais il faut aussi et surtout que les autorités publiques aient la capacité de faire évoluer les structures financières et leur gouvernement dans un sens partenarial, en rupture avec la dictature de la « valeur actionnariale » et de la rentabilité financière maximum[141].

La crise financière a prouvé que les marchés sont court-termistes. Il est donc crucial pour l'Europe de créer un cadre pour la restauration de l'investissement à long terme afin de faire face aux immenses besoins humains et matériels non satisfaits (éducation, formation, infrastructures, développement durable...).

L'Union pourrait inciter les Etats à diriger l'épargne du public et les investisseurs institutionnels vers ces investissements de long terme; et elle devra fournir un cadre favorable à la promotion de structures européennes spécifiques. Suite à l'initiative de la Caisse des Dépôts française, de la Cassa Depositi e Prestiti italienne, de la KfW allemande et de la BEI, avec l'Instituto de Crédito Oficial espagnol et la PKO Bank Polski polonaise, un groupe d'investisseurs à long terme a créé le « Fonds Marguerite ». Il appelle au développement de très nombreux fonds d'investissement sectoriels. L'Union doit reconnaître que les investissements longs ne peuvent fournir la rentabilité exigée par les marchés; elle doit donc contribuer à leur réalisation par l'intermédiaire de garanties et d'incitations.

La plupart du temps, l'investissement à long terme fait appel à des partenariats public- privé (PPP), dans lesquels la part du financement privé est principale. Le développement de PPP nécessite un cadre positif de la Communauté, et les entités locales doivent avoir libre-

141. La Commission vient de publier un Livre vert très intéressant sur « le gouvernement d'entreprise dans les établissements financiers et les politiques de rémunération », http://ec.europa.eu/internal_market/company/modern/corporate_governance_in_financial_institutions_fr.htm

ment recours aux PPP sans être freinées par les asymétries en matière d'informations et de risques. De nombreux obstacles aux PPP sont engendrés par des règles de marché mal adaptées; aussi celles qui concernent les marchés publics, les procédures d'appels d'offres, ou les conditions financières devront être améliorées dans le cadre de la rénovation du marché intérieur.

Bien sûr, les défis de la restructuration et de la révision des finances publiques retiendront l'attention du public pendant des années. Les citoyens de chaque pays demandent protection à leurs gouvernements respectifs, tandis que ces derniers tentent de durcir la discipline budgétaire ! La restructuration des dépenses publiques nationales est indispensable. Mais le durcissement des exigences du Pacte de stabilité et de croissance (PSC) devrait être accompagné d'incitations. Ainsi les sanctions prévues à l'encontre des États membres défaillants n'ont pas un rôle curatif ! Par exemple faut-il supprimer des fonds structurels ou plutôt les transformer en outils d'incitations à des réformes structurelles pour l'innovation (« lisbonniser » ces fonds) ?

Il nous faudra établir un lien entre le PSC et le budget européen. Celui-ci devrait être revalorisé, afin qu'au niveau de l'Union, on dispose d'outils de solidarité et d'impulsion pour une nouvelle croissance[142]. Au cours de la récession, le budget communautaire a été privé de 5 % de ses ressources (les contributions des États membres étant en gros proportionnelles au PIB). Contrairement à ce que l'on pourrait penser, promouvoir un budget européen pourrait aider les États membres à restructurer leurs finances publiques: les contributions nettes des Etats pourraient être réduites si parallèlement l'Union était dotée de ressources propres (TVA intra-communautaire, taxe carbone, impôt sur les bénéfices... sont plusieurs pistes).

142. Carole Ulmer, « Budget communautaire: il est temps de rejoindre l'autre rive », Confrontations Europe la Revue n°91.

En même temps il faut établir la « valeur ajoutée » du budget européen: éliminer les duplications inefficaces de dépenses nationales, établir des programmes d'impulsion. Des sommes considérables sont gaspillées dans des domaines tels que la recherche, la défense ou l'aide au développement, simplement parce que les programmes nationaux se font concurrence. Mutualiser ressources et dépenses au niveau de la Communauté serait plus efficace, et un financement européen permettrait aux gouvernements nationaux d'économiser de l'argent. Le budget européen aurait un effet multiplicateur sur la croissance s'il était utilisé pour financer des secteurs dans lesquels le Traité de Lisbonne accorde de nouvelles compétences à l'Union : l'énergie, la recherche, la politique spatiale et l'immigration. La définition des biens publics européens ne devra d'ailleurs pas s'arrêter à la recherche et à la politique climatique. Elle devrait également englober, par exemple, la formation, la santé publique et la nutrition, l'agriculture et la cohésion !

Ces défis peuvent être relevés si nous adoptons une vision commune accompagnée d'une détermination plus forte. C'est une épreuve pour les démocraties européennes. La tâche n'incombe pas seulement aux gouvernements et aux institutions ; elle appelle l'implication des citoyens et l'émergence d'une société civile européenne.

2. Ponencia C. Barnard

The shaky legal foundations for institutional action under the employment, Lisbon and EU2020 Strategies

Catherine Barnard*

Abstract: This chapter considers the legal foundations for the EU institutions to act in the context of the Lisbon and EU2020 strategies, including the EES (the Luxembourg European Employment Strategy). It begins by examining the formal structure provided by the Treaties for these processes and the legal basis for the resulting measures, focusing on the social strand of the three strategies. The chapter then examines the documents resulting from these strategies to see whether a legal basis is specified and, if so, what. This data is used to conclude that, outside the context of the EES, there is a remarkable absence of any express legal basis for particular EU institutions to act. Nevertheless, the European Council has assumed a pre-eminent role, pushing forward these strategies even in the absence of express competence to do so. The legitimacy of this mode of decision-making is then conside-

red, particularly in the light of the changes introduced by the Lisbon Treaty.

I. Introduction

The Lisbon Strategy 2000, its precursor the European Employment Strategy (EES), and Lisbon's replacement, the EU 2020 strategy, form a (controversial) part of the DNA of the European Union. Much has been written of the new governance methodologies, and in particular of the open method of coordination (OMC), which have been developed in order to attain these strategies, and their legitimacy (or otherwise).[143] This contribution considers another aspect of the legitimacy question, namely the very legal foundations of these strategies. In other words, what is the legal basis for the EU to act in both drawing up these three strategies and shaping their future direction? As Armstrong notes,[144] competence concerns manifest themselves at both the systemic level—illustrated by the difficulties encountered in 'constitutionalising' the OMC in the ill-fated Constitutional Treaty—as well as at a more micro-level, in terms of whether the Treaties provide a solid legal basis for the substantive evolution of policy-coordination processes. As Section II will show, in the field of the EES, the Treaties now provide a more solid legal foundation for coordination. However, in respect of other

143. * Trinity College, Cambridge. I am grateful to Philip Allott, Alan Dashwood and Oke Odudu for interesting discussions on issues raised by this chapter. This paper has also been published in (2009-10) 12 Cambridge Yearbook of European Legal Studies forthcoming.
See, eg J Zeitlin, P Pochet and L Magnusson, The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies (Brussels, Presses Interuniversitaires Européennes-Peter Lang, 2005); J Zeitlin, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?' in G de Búrca (ed), EU Law and the Welfare State: In Search of Solidarity (Oxford, Oxford University Press, 2005); E Szyszczak, 'Experimental Governance: The Open Method of Coordination' (2006) 12 ELJ 486; K Armstrong and C Kilpatrick, 'Law, Governance, or New Governance? The Changing Open Method of Coordination' (2007) 13 Columbia Jo. E. L. 649; the essays resulting form the JCMS symposium on EU Governance after Lisbon (2008) 46 JCMS 413; M Heidenreich and G Bischoff, 'The Open method of Coordination: A Way to the Europeanisation of Social and Employment Policies' (2008) 46 JCMS 497.

144. K Armstrong, 'Governance and Constitutionalism After Lisbon' (2008) 46 JCMS 413.

aspects of the Lisbon and EU 2020 strategies, a solid legal foundation is much less apparent. These strategies have been driven forward instead by the European Council, a body that until December 2009 was not formally recognised as an institution by the Treaties,[145] albeit that its coordinating function has been recognised since 1974.[146]

It is the legal basis for the institutions to act, rather than the substantive areas in which those actions are occurring, which is the main concern of this chapter. The chapter looks at the documents leading up to, and resulting from, the Lisbon strategy, including the EES, to see whether a legal basis is specified and if so what (Annex I). It takes as a focus the social strand of the Lisbon Strategy, namely the modernisation of the European social model. This process of modernisation includes 'more and better jobs'. The Luxembourg European Employment Strategy (EES), launched in November 1997, was called in aid to achieve this objective. The EU 2020's priorities also include 'inclusive growth' with the flagship initiative 'An agenda for new skills and jobs' which builds on the employment dimension of both the Lisbon and EES strategies. It is these documents that we shall concentrate on.

The data gained from the mapping exercise is used to show that the techniques employed under these strategies seek 'policy convergence but by means other than the constitutionalized legislative process'[147]

145. For a fuller discussion of the different capacities in which the 'Heads of State or Government' can act, see A Dashwood, 'Decision-Making at the Summit' (2000-2001) 3 CYELS 79.

146. Communiqué issued by the Paris summit: 'Recognising the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe, the Heads of Government consider it essential to ensure progress and overall consistency in the activities fo the Communities and in the work on political coordination. The Heads of Government have therefore decided to meet, accompanied by the Ministers of Foreign Affairs, three times a year and, whenever necessary, in the Council of the Communities and in the context of political cooperation'. The SEA 1986 specified the composition of the European Council but 'deliberately abstained from defining its role' (J Peterson and M Shackleton, The Institutions of the European Union, 2nd edn (Oxford, Oxford University Press, 2006), 45).

147. Armstrong, above n 15, 417.

(Section III). In other words, outside the EES there is no express legal basis for the EU institutions to act i.e. there is no legal basis either in the narrow, technical sense of the term (where a Treaty provision gives the EU institutions the power to act on a proposal from the Commission in accordance with, say, the ordinary legislative procedure) nor in the broader sense of the term (i.e. whether the matter falls in the scope of EU law at all).

This raises the question as to how policy convergence comes about and its legitimacy. It will be argued that the European Council has assumed for itself considerable freedom to act. As a political actor, it has felt itself, in the past at least, to be largely unconstrained by the constitutional rules limiting the actions of the other institutions. While the entry into force of the Lisbon Treaty may have changed this, current practice suggests not. Nevertheless, a continuing disregard for the constitutional limits laid down by EU law may have something important to say about the changing approach to governance in the EU: perhaps a shift (back?) from the Classic Community Method (CCM) to greater intergovernmentalism? This has implications for the balance of power between institutions and between the EU and the Member States.

The chapter concludes by considering whether the shaky legal foundations of the Lisbon and EU2020 strategies actually matter (Section IV). If the strategies are launching initiatives which are working, is it really of concern what their foundations might be? On the other hand, in a system based on the attribution of powers, expressly articulated for the first time in the Lisbon Treaty, it might be thought that the institutions should respect these limits. To an extent, the post-hoc Treaty amendments have sought to constitutionalise some of the practices which were already occurring. This demonstrates a desire to place these 'emerging governance techniques on a surer constitutional and

legal footing',[148] possibly to limit their impact, possibly to facilitate their development,[149] or, more likely, to render less shaky the legal foundations of practices that were already taking place.

We begin by examining the formal structure provided by the Treaties for these processes and the legal basis for the resulting measures (Section II). In practical terms, we shall focus on the EES, the only policy area where the Treaties have given express competence to the EU.

II. The Formal Foundations of the Strategies

A. Introduction

Before considering the formal legal basis for the European Employment Strategy provided by the Amsterdam Treaty, we shall take a brief look at the background to what became the Employment Title in the Treaties. The reason for this is to highlight the significant role played by the European Council working in tandem with the Commission, a role that, it will be argued, became the pattern for subsequent cooperation in the context of the Lisbon Strategy. The approach adopted by the European Council and the Commission prior to the Amsterdam Treaty was subsequently formalised at Amsterdam. Likewise, the significant leadership role played by the European Council from 2000-2010 was formalised, at least in part, by the Lisbon Treaty.

B. The Essen approach

1. The Background

148. Ibid.

149. Ibid.

By the mid-1990s, the European Union was becoming increasingly concerned about the high levels of unemployment in Europe, drawing comparisons with the US where the rate of unemployment was lower than the European average, and the rate of job creation higher.[150] The Employment Rates Report argued that as many individuals as possible should have an attachment to the world of work to contribute to, as well as participate in, an active society, and to enjoy the benefits of progress and prosperity. This was necessary not only for reasons of social cohesion and personal dignity[151] but also for reasons of economic efficiency.

2. The Process of Policy Formulation

While there was much agreement on the need to increase the employment rate, there was much less agreement as to how to bring it about and who was to realise this (the Member States, the EU, or both working in cooperation). According to Rhodes, it was the European Commission, operating in 'full entrepreneurial mode', which managed to mobilise a coalition of like-minded social democratic governments in support of the creation of a common European policy for employment promotion.[152] He added 'Attempting to blend the priorities of European social democrats, Christian democrats and liberals, the tactical aim of

150. F Scharpf, Governing in Europe: Effective and Democratic? (Oxford University Press, Oxford, 1999) 123. Further details of the Essen approach can be found in C.Barnard, EC Employment Law (Oxford, Oxford University Press, 2006) ch. 3.

151. This was recognised by the Amsterdam European Council's Resolution on Growth and Employment 97/C236/02: 'This approach, coupled with stability based policies, provides the basis for an economy founded on principles of inclusion, solidarity, justice and a sustainable environment, and capable of benefiting all its citizens. Economic efficiency and social inclusion are complementary aspects of the more cohesive society that we all seek.'

152. M Rhodes, 'Employment Policy: Between Efficacy and Experimentation' in H Wallace, MA Pollack and AR Young, Policy-Making in the European Union, 6th edn (Oxford, Oxford University Press, 2010) 294.

this initiative was to strike a new political balance between notions of solidarity and competitiveness behind the EU's 'social dimension'.[153]

The question, then, was how should this be achieved. For example, should centralised—ie European-level—expenditure be used to stimulate demand, and thus employment, through investments in infrastructure and public works.[154] While this approach received some impetus from the Delors' Commission's 1993 White Paper on Growth, Competitiveness and Employment,[155] the Member States refused to countenance a significant increase in the Commission's budget. However, the importance of this White Paper lay in the policy mix it proposed based on the centralised coordination of employment policies and its combination of a deregulatory agenda with active labour market measures.

This policy mix was essentially endorsed by the Essen summit in 1994, which identified five job creation priorities,[156] including: greater investment in vocational training; an increase in the employment-intensiveness of growth through more flexible organisation of work; a reduction in non-wage labour costs; and, most importantly, a move from a passive to an active labour market policy, eliminating disincentives, providing suitable income support measures and reviewing the effectiveness of instruments of labour-market policy. A number of these proposals were clearly deregulatory in character[157]; others assumed a more proactive role for the state and were based on an agenda of restructuring public expenditure in favour of more active employment market policies (eg

153. Ibid.

154. C Barnard and S Deakin, 'A Year of Living Dangerously? EC Social Policy Rights, Employment Policy and EMU' (1998) 2 IRJ European Annual Review 117.

155. EC Bull Supp 6/93.

156. Bull 12/94.

157. See S Deakin and H Reed, 'Between Social Policy and EMU: The New Employment Title of the EC Treaty' in J Shaw (ed), Social Law and Policy in an Evolving European Union (Oxford, Hart Publishing, 2000).

subsidies for training) and the need to strengthen structural policies objectives relating to those excluded from the labour market (women, young people and the long term unemployed).[158]

From a procedural perspective, the approach agreed at Essen was also of longer-term interest. The European Council laid down a monitoring procedure under which the Member States were required to report back on the steps they had taken. A benchmarking exercise was conducted to promote best practice, focusing on long-term unemployment, youth unemployment and equal opportunities.

3. The Legal Foundations for the Action by the Institutions

Essen therefore provided the template for the European Employment Strategy (EES), and the Essen priorities were replicated in what became the EES's employment guidelines. Most significantly, Essen showed the Member States that it was possible to coordinate their activities at European level to achieve national objectives of reducing unemployment. For the purposes of this chapter, however, what is remarkable is that the Commission took the lead in policy-making by suggesting various possible approaches both in terms of substance as well as in terms of methods, and these were then followed up by the European Council in the precursor of what was to become one of the heavier forms of the Open Methods of Coordination (OMC). The absence of any formal legal basis for this form of policy-making was also striking.

The Commission, of course, had a role as guardian of the Treaties under what was then Article 155 EEC, subsequently Article 211 EC. It had the power to 'formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Com-

158. E Szyszczak, 'The New Paradigm for Social Policy: A Virtuous Circle' (2001) 38 CML Rev 1125, 1136.

mission considers it necessary'. It also had 'its own power of decision and [must] participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty'. The reference to the Council, and not the European Council, is instructive. The European Council was not recognised at that stage as an institution (although it did have a coordinating role under Article 4 EU[159]). However, the Commission's powers were confined to ensuring the 'proper functioning or development of the common market'. At the time that the Essen documents were being drafted 'a high level of employment'[160] was not actually identified as a task of the European Economic Community, although the Commission might have thought that this was implicit in the reference to 'the raising of the standard of living and quality of life, and economic and social cohesion'.

Some of these specific, competence-related problems were subsequently addressed by Treaty amendment. The Amsterdam Treaty amended Article 2 EC to give the Community the task of promoting 'a high level of employment'. Following the Lisbon Treaty, the attainment of 'full employment' is now a task of the Union under Article 3 TEU. In addition, the Commission's powers have now been redrafted in Article 17(1) TEU. It is to 'promote the general interest of the Union and take appropriate initiatives to that end... It shall exercise coordinating, executive and management functions, as laid down in the Treaties'.These new powers 'codif[y] the general practice before the Lisbon Treaty'.[161]

159. This is considered below.

160. Article 2 EC as amended by the Treaty of Amsterdam.

161. J-C Piris, The Lisbon Treaty: A Legal and Political Analysis (Cambridge, Cambridge University Press, 2010) 230, writing in the context of the amendment of some of the other provisions on the Commission.

C. The Amsterdam Treaty and the Employment Title

1. The Treaty Foundations

Despite the fact that there had been little evaluation of the success of the Essen strategy,[162] its approach was a defining feature of the new Employment Title introduced by the Amsterdam Treaty.[163] According to Article 145 TFEU (ex Article 125 EC), the key provision of the new Title:

Member States and the Union shall, in accordance with the Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.[164]

Article 146 TFEU (ex Article 126 EC) makes clear that the principal actors are the Member States. They are required to coordinate their policies for the promotion of employment (which is to be regarded as an issue of 'common concern')[165] within the Council, but in a way consistent with the broad economic guidelines (BEPG) laid down within the framework of EMU. This point is reiterated in Article 148(2) TFEU. Thus, the Treaties appear to mandate the supremacy of the BEPGs over employment policy, a view which is supported by the harder

162. P Pochet, 'The New Employment Chapter of the Amsterdam Treaty' (1999) 9 JESP 271, 275. This section draws on C.Barnard, EC Employment Law (Oxford, Oxford University Press, 2006) ch. 3.

163. See also M Biagi, 'The Implementation of the Amsterdam Treaty with Regard to Employment: Coordination or Convergence?' (1998) 14 IJCLLIR 325.

164. Emphasis added.

165. Article 146(2) TFEU (ex Article 126(2) EC). Sciarra notes the parallel track of co-ordination and co-operation in the Employment Title: S Sciarra, 'The Employment Title in the Amsterdam Treaty: A Multilanguage Legal Discourse' in D O'Keeffe and P Twomey (eds), Legal Issues of the Amsterdam Treaty (Oxford, Hart Publishing, 2009).

sanctions available for failure to comply with the chapter on Economic Policy.[166]

In terms of process, each year the Council and Commission are to make a joint report on employment in the Union.[167] This is then considered at a European Council meeting which draws up its conclusions.[168] On the basis of these conclusions, the Council, acting by qualified majority on a proposal from the Commission (after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee (EMCO)), draws up employment guidelines—guidelines consistent with the broad economic guidelines issued in relation to EMU[169]—which the Member States 'shall take into account in their employment policies'.[170] This process recognizes that the European Council is not a legislator; rather, its decisions are political.[171] Decisions requiring legal effect – the adoption of the guidelines—must follow traditional CCM procedures.[172]

Once the employment guidelines for a given year are adopted, Article 148(3) TFEU (ex Article 128(3) EC) requires each Member State to make an annual report to the Council and the Commission on 'the principal measures taken to implement its employment policy in the light of the guidelines for employment'—the so-called National Action

166. See S Ball, 'The European Employment Strategy: The Will but Not the Way?' (2001) 30 ILJ 353, 360, although she notes that the Cologne and subsequent European Councils have stressed the equal importance of both aspects of EU law and policy.

167. Article 148(4) TFEU (ex Article 128(4) EC).

168. Article 148(1) TFEU (ex Article 128(1) EC).

169. Article 121 TFEU (ex Article 99 EC).

170. Article 148(2) TFEU (ex Article 128(2) EC).

171. Peterson and Shackleton, above n 17, 55.

172. N Nugent, The Government and Politics of the European Union, 6th edn (Basingstoke, Palgrave Macmillan, 2006) 236.

Plans (NAPs),[173] renamed in 2005 as National Reform Programmes (NRPs). These reports are considered by EMCO as part of a process of mutual surveillance and peer review. EMCO then reports to the Council, which examines the employment policies of the Member States in the light of the guidelines on employment. The Council (EPSCO—the Employment, Social Affairs, Health and Consumer Affairs Council, now ESPHCA) and Commission then submit a joint report to the European Council[174] on how far the guidelines have been implemented.[175] The annual process then starts again.

When making its examination of the NAPs/NRPs, the Council may, acting by qualified majority on a recommendation from the Commission, 'make recommendations to Member States'.[176] This recommendation procedure is the main innovation in the Employment Title: if the employment guidelines are not being observed by a Member State, a recommendation can be issued which is, in effect, a warning for failure to comply with the guidelines.[177] A similar procedure can be found in monitoring the compliance with EMU. However, under EMU, a Member State which fails to observe warnings issued by the Council in relation to excessive levels of national debt and excessive budget deficits may be subject to a fine[178]; under the Employment Title the

173. Communication from the Commission 'From Guidelines to Action: The National Action Plans for Employment', COM(98) 316. E Szyszczak, 'The Evolving European Employment Strategy' in J Shaw (ed), Social Law and Policy in an Evolving European Union (Oxford, Hart Publishing, 2000); J Kenner, 'The EC Employment Title and the 'Third Way: Making Soft Law Work?' (1999) 15 IJCLLIR 33; S Sciarra, 'Integration through Coordination: the Employment Title in the Amsterdam Treaty' (2000) 6 Columbia Journal of European Law 209.

174. The report is drafted by the Commission and is then modified and/or endorsed by ESPHCA.

175. Article 148(5) TFEU (ex Article 128(5) EC). The first Joint Employment Report can be found at <http://www.europa.eu.int/comm/employment_social/employment_strategy/report_1998/jer98_en.pdf> accessed 19 July 2010.

176. Article 148(4) TFEU (ex Article 128(4) EC).

177. See Deakin and Reed, above n 28. The first recommendations were issued in 2000: Council Recommendation 2000/164/EC (OJ 2000 L52/32).

178. Article 126(1) TFEU (ex Article 104(1) EC).

recommendation is without sanction. This recommendation process is supposed to form part of the 'naming and shaming' process. These NRPs are subsequently 'peer reviewed' in the 'Cambridge' process—a closed two-day meeting of the Employment Committee. The peer review is followed by bilateral meetings between representatives of government and the Commission.[179]

Not only can the Council issue recommendations, it can also act to 'adopt incentive measures designed to encourage co-operation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects' (Article 149 TFEU (ex Article 129 EC)). However, these limited measures 'shall not include harmonisation of the laws and regulations of the Member States'.

2. Observations

For the purposes of this chapter, three observations can be made about the Employment Title. First, it formalised, and thus legitimised a process which had already begun to take shape at Essen. This was all the more important given that the EU was stepping into a sensitive national domain (employment). Second, the Amsterdam Treaty gave a firmer foundation to the (at the time) 'unorthodox' method deployed (OMC) and a 'heavy-duty'[180] version of OMC at that since it was backed up by (soft law) sanctions. The Employment Title also provided a legal

179. M Rhodes, 'Employment Policy: Between Efficacy and Experimentation' in Wallace, Wallace and Pollack (eds), Policy-making in the European Union (Oxford, Oxford University Press, 2005) 295.

180. Or, to use the terminology of Belgian minister Frank Vandenbroucke, open coordination is not some kind of 'fixed recipe' that can be applied to whichever issue but is instead 'a kind of cookbook that contains various recipes, lighter and heavier ones': cited in J Zeitlin, 'Introduction: The Open Method of Coordination in Question' in J Zeitlin and P Pochet with Magnusson (eds),

basis for the subsequent employment guidelines adopted annually by the Council of Ministers. For the first two years, these took the form of soft law resolutions (see Annex I below).[181] Subsequently, they were adopted as Decisions, probably reflecting the fact that a CCM method is prescribed in Article 148(2). These are the only hard law measures adopted under the EES. Most of the measures are soft law: particularly reports and recommendations.[182] Thirdly, the European Commission and the European Council, working in tandem, play a leading role.

D. The Lisbon Strategy

The Luxembourg EES, together with the various economic strategies, were reviewed at the end of 1999. This review led to a more fundamental new agenda: the Lisbon strategy. On 23-24 March 2000 the European Council held a special meeting in Lisbon to agree a 'new strategic goal' for the Union in order to 'strengthen employment, economic reform and social cohesion as part of a knowledge-based economy'.[183] This strategic goal was for the Union to become 'the most competitive and dynamic knowledge based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'.[184] The strategy aimed at (1) preparing the transition to a knowledge-based economy, (2) sustaining the healthy economic outlook and favourable growth prospects by applying an appropriate

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The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies' (Brussels, PIE-Peter Lang, 2005).

181. The use of 'Resolutions', at least in the first year, reflects the fact that the Amsterdam Treaty, which introduced the Employment Title, was not yet in force.

182. See eg I. Senden, Soft Law in European Community Law: Its Relationship to Legislation (Oxford, Hart Publishing, 2004); B de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty' in S Griller and J Ziller, The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty (Vienna, Springer-Verlag, 2008).

183. Lisbon Presidency Conclusions, 23 and 24 March 2000.

184. Ibid, para 5.

macro-economic policy mix, and, most importantly for our purposes, (3) modernising the European Social Model.[185]

The Lisbon strategy identified four elements to this process of modernisation including more jobs and better quality jobs. In order to achieve this, the Lisbon strategy looked to the Luxembourg process, as amended by the mid-term review,[186] to give substance to this goal. However, it recognized that the Luxembourg process needed to be better targeted. The heads of state therefore agreed at Lisbon to set employment rate targets for what would amount to 'full employment', something they had not managed at Luxembourg.[187] The targets were ambitious: of 'raising the employment rate from an average of 61% today to as close as possible to 70% by 2010 and to increase the number of women in employment from an average of 51% today to more than 60% by 2010'.[188] An additional target was added by the Stockholm European Council, namely increasing the average EU employment rate among older men and women (55-64) to 50 per cent by 2010.[189] Principal among the means of achieving these targets while at the same time guaranteeing better quality jobs was the 'flexicurity' agenda.[190] Underpinning this idea is the aim is to create a 'labour market which is fairer, more responsive and inclusive, and which contributes to making Europe more competitive'.[191] As the Commission explains in its 2007

185. Ibid.

186. See Barcelona European Council, 15-16 March 2002, para 30.

187. Cf Commission Communication, 'Proposal for Guidelines for member States Employment Policies 1998', COM(97) 497, Section I where the Commission proposed a target of increasing the employment rate from 60.4% to 65% thereby creating at least 12 million new jobs.

188. Ibid, para 30. Intermediate targets were also set: of 67% overall and 57% for women: Stockholm European Council, 23 and 24 March 2001, para 9.

189. Ibid., para 9.

190. See more generally J.Kenner, 'New Frontiers in EU Labour Law: From Flexicurity to Flex-security' in S.Currie and M.Dougan (eds), Fifty Years of the Treaty of Rome (Oxford, Hart Publishing, 2009).

191. Commission Green paper, Modernising labour law to meet the challenges of the 21st century: COM(2006)708, 4.

Paper, Towards Common Principles of Flexicurity: More and better jobs through flexibility and security,[192] 'Flexicurity promotes a combination of flexible labour markets and adequate security'. It says flexicurity is not about deregulation, giving employers freedom to dissolve their responsibilities towards the employee and to give them little security. Instead, flexicurity is about bringing people into good jobs and developing their talents. Employers have to improve their work organization to offer jobs with future. They need to invest in their workers' skills. The Commission calls this 'internal flexicurity'. However, the Commission also recognises that keeping the same job is not always possible. 'External flexicurity' attempts to offer safe moves for workers from one job into another, and good benefits to cover the time span, if needed.

E. EU2020

1. What it does

The Lisbon Strategy was revised in 2005 and replaced by EU2020 in June 2010. The EU2020 Strategy had to respond to the economic crisis starting in the Autumn of 2008. This crisis revealed the extravagance of the targets prescribed by the Lisbon Strategy: Europe is far from being the most dynamic knowledge-based economy in the world in 2010. The crisis wiped out any gains in economic growth and job creation which had occurred over the previous decade—GDP fell by 4% in 2009, industrial production dropped back to the levels of the 1990s, and 23 million people (10% of the active population) were unemployed. Public finances have also been severely affected, with deficits at 7% of GDP on average and debt levels at over 80% of GDP.[193]

192. COM(2007)359, 5.

193. Commission Communication, Europe 2020. A Strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 5.

Does that mean that the Lisbon strategy was a failure?[194] Certainly, many of the criticisms of the Lisbon strategy proved justified: the goals were too ambitious, there were too many targets, the Commission had no real powers to use against defaulting states, there was a lack of commitment by a number of states to the strategy, many of which saw it as a bureaucratic exercise which had little effect on their day-to-day government, and, at a time of the largest expansion of the European Union and major Treaty reform, insufficient attention was paid to realising the Lisbon strategy and communicating and promoting its benefits. On the other hand, the shift in emphasis identified by the Lisbon strategy in fact has marked a more permanent and fundamental change in the EU's approach to workers: workers are no longer seen as (passive) beneficiaries of social rights. Instead they are seen as having to take (active) responsibility for updating their skills and making themselves employable.

The modernization agenda made concrete by the Lisbon strategy fed directly into the less ambitious Europe 2020 programme adopted in March 2010. It also puts forward three mutually reinforcing priorities:

(1) Smart growth: developing an economy based on knowledge and innovation.

(2) Sustainable growth: promoting a more resource efficient, greener and more competitive economy.

(3) Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion.

194. The Swedish prime minister, Frederick Reinfeldt, is reported as having recognised this: EurActiv, 'Sweden admits Lisbon Agenda "failure"', 3 June 2009, available at <http://www.euractiv.com/en/priorities/sweden-admits-lisbon-agenda-failure/article-182797> accessed 19 July 2010.

The 'inclusive growth' priority is the direct descendant of the third limb of the Lisbon Strategy of 'modernising the European social model' and the active labour market policies it envisaged. So, the Commission says that 'Inclusive growth means empowering people through high levels of employment, investing in skills, fighting poverty and modernising labour markets, training and social protection systems' to help people anticipate and manage change, and build a cohesive society.[195] It continues that 'Implementing flexicurity principles and enabling people to acquire new skills to adapt to new conditions and potential career shifts will be key'. Further, in a reference to the principles underpinning its 2007[196] and 2008 Social Agenda communications,[197] the Commission says that inclusive growth is also about 'ensuring access and opportunities for all throughout the lifecycle'.[198]

The 2020 document proposes a more limited (but still ambitious) set of targets than the Lisbon Strategy. These EU targets, which have to be translated into individualized national targets and trajectories, include 75% of the population aged 20-64 to be employed; 3% of the EU's GDP to be invested in R&D; and the share of early school leavers to be under 10%. These targets are interrelated. As the Commission notes, better educational levels help employability and progress in increasing the employment rate helps to reduce poverty. A greater capacity for research and development as well as innovation across all sectors of the economy, combined with increased resource efficiency, will improve competitiveness and foster job creation.

195. COM(2010) 2020, 16.

196. Opportunities, access and solidarity: towards a new social vision for 21st century Europe, COM(2007) 726.

197. Renewed Social Agenda: Opportunities, Access and Solidarity, COM(2008) 412.

198. Ibid.

III. The Approach adopted in the Strategies

What measures and documents have, then, resulted from the Luxembourg EES, the Lisbon Strategy and EU 2020? The key ones have already been referred to in Section II. However, Annex I attempts to map the main documents and instruments which have resulted from these processes. They have been recorded in a chronological table which also identifies the main actors, the legal basis of the measure, if any, a brief summary of the content of the measure, and any other observations. This mapping process enables the following observations to be made.

A. Significant leadership provided by the European Council

It has long been observed that the Lisbon and EES strategies have benefitted from much intergovernmental input. This is borne out by the chronological survey. The key points in the evolution of the Lisbon and Luxembourg strategies have been signposted by the European Council's 'Presidency Conclusions'. This raises the question of the legitimacy of the European Council. Article 4 EU provided that 'The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof'. This emphasises that the role of the European Council is 'essentially a political one',[199] a view confirmed in the Lisbon Presidency Conclusions of March 2000, which said that the European Council is to take a 'pre-eminent guiding and coordinating role to ensure overall coherence', in particular through an additional meeting of the European Council, taking place in the Spring, concerned solely with economic and social questions.[200]

199. A Arnull et al, Wyatt and Dashwood's European Union Law, 5th edn (London, Sweet & Maxwell, 2006) 31. See also J Werts, The European Council (John Harper Publishing, 2008).

200. Preliminary Conclusions, paras 35 and 36.

The European Council thus sees itself as the pre-eminent body of the EU, even though it did not acquire the status of an institution until the Lisbon Treaty.[201] This was, perhaps, inevitable. Absent a body taking a leadership role, albeit at the risk of upsetting the constitutional balance between institutions, there would be a risk that the EU would stagnate. The question, then, is what powers does the European Council have to act? Is it confined to acting in the areas already identified as falling within the scope of EU law or can its remit extend further? As the chronology set out in Annex I shows, there is no evidence of any legal basis (in either the narrow or broad sense) being stated for the European Council's actions.

On one view, the European Council is an intergovernmental, political body operating outside the sphere of the EU 'constitution'. According to this perspective, the absence of any legal basis for the European Council to act is unremarkable: the Member States retain their sovereign powers and are exercising them through the European Council formation. In other words, if (when) the European Council is a 'get-together of top-people' from the Member States, it does not need to comply with the formalities and limits laid down by European Union law since it is essentially an intergovernmental meeting.

This flexibility and fluidity found in this approach is recognized by Peterson and Shackleton:

...viewing the European Council as a locus of power helps explain its ambivalence in institutional terms. Without the Constitutional Treaty its powers, procedures, and decision–making are not determined by legal texts. It deals with whatever problem it wants to deal with, in the manner it judges most appropriate. Nowhere is its role clearly defined, yet that role is fundamental to the life of the Union. It can live with

201. Art. 13 TEU.

that ambivalence because it is bent on the exercise of the power de facto and not on legally-binding decision-making.[202]

They do, however, note the paradox that for the first twelve years of its existence (1974-1986), the European Council met, and exercised significant power, without any legal basis in the Treaties. They continue 'In a highly structured legal system, such as the [Union], this was indeed a strange phenomenon'.[203]

If, on the other hand, the European Council is seen as operating as the 'European Council', an institution of the Union under Article 13 TEU, it will be subject to the principle of conferral laid down in Article 5(1) TEU and so must confine its activities to the subject areas recognised as falling within the scope of EU Treaties. Furthermore, it needs to justify its action with reference to some legal basis in the Treaties. As the role of the European Council has been formalised with each Treaty amendment—culminating in its recognition as an EU institution with a full-time chair and its own rules of procedure[204] –this latter view seems to be the better one. There is, of course, nothing to prevent the heads of European states getting together to discuss matters of common concern where they will not be tied by obligations under EU law.[205] However, when they meet as the 'European Council' both in the areas specified by the Treaties, such as under Article 148(1) TFEU considering the employment situation in the Union, and in other areas where they put out Conclusions in the name of the European Council, the European Council must respect the requirements and limitations

202. Peterson and Shackleton, above n 17, 47.

203. Peterson and Shackleton, above n 17, 43.

204. See Articles 235-6 TFEU and EU Council Dec 2009/882/EU, OJ 2009 L315/51. Earlier rules for the organisation of the proceedings of the European Council can be found in Annex I of the Seville European Council Presidency Conclusions, 21-22 June 2002.

205. See also Dashwood, above n 16, 103 '... there is no actual need for express [Heads of State or Government] attribution. The European Council is free to discuss any matter it chooses, at any level of generality or particularity'.

of EU law. Thus, the greater the formalization of the position of the European Council through Treaty amendment—in the interests of transparency—the less flexibility there is for the European Council to act.

Yet, if the modern view is correct, why does the European Council continue to disregard the standard legal formalities associated with action by an EU institution? There are four possible explanations for this. First, practice has not caught up with the increasing formalisation of the role of the European Council. As Peterson and Shackleton note, 'The European Council has always attached the highest importance to the informality of its meetings'.[206] Requirements to specify any legal foundations of particular activities, especially political activities, interfere with such informality. Secondly, the European Council is a body comprised of politicians—heads of state—who in their national capacities are 'ultimate decision-takers'. Again, as Peterson and Shackleton put it, 'Collectively they consider themselves, in the European context, as having a similar task. Essentially, they come together to take decisions, and expect those decisions to be respected.'[207] Thirdly, if those politicians consider that they are taking political, as opposed to legal, decisions then the need to subject those decisions to legal formalities probably seems to them to be unnecessary.

Fourthly, there is an absence of effective sanctions or other control mechanisms over the European Council. While, following amendments introduced by the Lisbon Treaty, the Court of Justice has jurisdiction over acts of the European Council 'intended to produce legal effects vis-à-vis third parties',[208] it will not have jurisdiction over the Euro-

206. Peterson and Shackleton, above n 17, 47.

207. Peterson and Shackleton, above n 17, 45. See also Dashwood, above n 16: '... a clearly framed set of instructions is sure to be complied with by the institutions with formal legal powers'.

208. Article 263(1) TFEU. However, as Philip Allott notes, the Lisbon judgment of the German Federal Constitutional Court seems to suggest that the European Council would be subject to the

pean Council's more general functions. Furthermore, control by the other EU institutions is also weak. The European Parliament appears to wield little influence over the European Council, albeit that the President of the European Parliament addresses the opening sessions of summits to inform heads of state or governments (HSG) of the European Parliament's thinking.[209] Accountability of HSGs to national parliaments is also feeble.

Taken together these reasons help to explain why the European Council continues to do as it always did and legal requirements remain overlooked.

B. The Influential Role of the Commission

The pre-eminence of the European Council has come at the expense of the other institutions. For the Commission, soft coordination has not necessarily been a good thing: it has reinforced its think-tank role, at the expense of its role in hard policy, and this makes the Commission look weaker than the other institutions.[210] On the other hand, much of the thinking and the creativity has come from the Commission. Its role in shaping OMC, proposing the amendments to the Lisbon strategy, drafting the integrated guidelines, may have been overlooked. In particular, the June 2010 European Council Conclusions on EU 2020 are a carbon copy of the Commission's proposals of March 2010.

The Commission has also been influential in developing related policies. Take for example, the 'flexicurity' agenda. After two calls by the European Council for a communication on flexicurity (Spring and June European Councils 2007), the Commission delivered its

jurisdiction of that court even in respect of those functions, with the possibility that the Federal Constitutional Court might find that the European Council had exceeded its limits.

209. Nugent, above n 43, 238.

210. Discussion with Commission official.

influential 2007 Communication,[211] which was then approved by the Employment Affairs Council. Flexicurity still features in the EU2020 agenda. The Commission has also played an important role in offering various visions for a social agenda for the EU. Its social policy agenda of July 2000, based on the Lisbon strategy and the Commission's programme of action announced to the European Parliament, saw social policy as an input into growth. This was reflected in the European Council's conclusions at Nice in December 2000. The Commission's Renewed Social Agenda of 2007 and 2008 mooted third way and capabilities thinking (helping individuals to help themselves).[212] While this experimentation has left less of an indelible mark, perhaps thwarted by the financial crisis of 2008, it does show the Commission's role in generating ideas. However, as discussed above,[213] prior to the Lisbon Treaty amendments, the formal legal basis on which the Commission could act were far from clear.

C. The Lack of Visibility of the European Parliament

While the Commission has enjoyed some influence, the European Parliament and national parliaments have been almost invisible.[214] According to Article 148(2) TFEU the European Parliament is to be consulted in the drawing up of the employment guidelines (although it is not involved in any other OMC process) but experience over the first five years of the EES showed that its role was marginal, in part due to the lack of time in the EES timetable for it to prepare its opinion.[215] This was addressed, at least in part, by the 2005 reforms. The

211. See above n. 50.

212. C. Barnard, 'Solidarity and the Commission's 'Renewed Social Agenda' in M. Ross and Y. Borgmann-Prebil, Promoting Solidarity in the European Union, (Oxford, OUP, 2010) 73.

213. See nn.17-18 above.

214. See also Rhodes, above n 23, 299.

215. The 2003 reforms have helped to overcome this problem: Rhodes, above n 50, 295.

European Parliament did establish a website on the Lisbon strategy,[216] which largely played a cheer-leader role for the strategy, albeit that it did admit:

Many of the measures agreed at Lisbon were not legislative but intergovernmental, based on coordination and benchmarking among Member States, with the Commission and European Parliament in a bystanders' role.

Perhaps most telling was the frank admission 'A more effective form of governance in the employment and social area than the open method of coordination, which failed to achieve some of its aims, is needed for the years to come' and that the Council and the Commission must 'involve Parliament fully in drawing up objectives, targets and indicators for the new economic and employment strategy, and also to give Parliament access to documents, meetings, and work on monitoring and reviewing progress'.[217]

The Lisbon Treaty has not changed this. Despite the generalising of the ordinary legislative procedure by the Lisbon Treaty, this has not been extended to Article 148 TFEU, the legal basis for adopting the employment guidelines. The involvement of the Social Partners was hoped to fill this legitimacy gap but the commitment on paper to the participation of the Social Partners has often not manifested itself in practice. This has led some commentators to suggest that, on the one hand, the involvement of such a wide range of actors has actually blurred responsibility for economic and social policy, and, on the other, the absence of effective involvement by the social partners, the lack of involvement the European Parliament and the absence of judicial

216. Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20070202BKG02682&language=EN#title1> accessed 19 July 2010.

217. Available at <http://www.europarl.europa.eu/news/expert/infopress_page/048-73522-116-04-18-908-20100426IPR73482-26-04-2010-2010-false/default_en.htm> accessed 19 July 2010.

review, has meant that the EES and Lisbon strategies far from being open, heterarchical and deliberative, are more closed, elitist and less democratic than the classic Community methods.[218]

D. Limited Role of Hard Law

In the light of the above observations, it is perhaps not surprising that the documents that have resulted from these processes have not produced much 'hard law'. The Council's Decisions on the employment guidelines are the only traditional hard law form, adopted (after the first two years) via the CCM with an appropriate legal basis. Otherwise, the processes are characterised by a range of soft law instruments not recognised by Article 288 TFEU (ex Article 249 EC) such as European Council Presidency Conclusions, Resolutions and Commission policy documents. In addition, as we have already seen, the EES expressly envisages a role for recommendations[219] as a sanction against poorly performing Member States.[220] However, unlike soft law adopted under the CCM—such as the recommendation on sexual harassment, which is subject to judicial interpretation[221] and, once hardened into hard law, judicial enforceability—the soft law of the EES derives its regula-

218. P Syrpis, 'Legitimising European Governance: Taking Subsidiarity Seriously within the OMC', EUI Working Papers, Law 2002/10. See the calls in the Final report of Working Group XI on Social Europe, CONV 516/1/03, para 44, for the 'incorporation of the open method of coordination in the Treaty [which] would improve its transparency and democratic character, and clarify its procedure by designating the actors and their respective roles'.

219. See, eg Council Recommendation of 14 Oct. 2004 on the implementation of Member States' employment policies 2004/741/EC, OJ 2004 L326/47.

220. Article 148(4) TFEU (ex Article 128(4) EC).

221. See Case 322/88 Grimaldi v Fonds des Maladies Professionnelles [1989] ECR 4407 where the Court of Justice said in the context of a Recommendation on compensation for persons with occupational diseases, that national courts were bound to take Recommendations into account in order to decide disputes before them, in particular where they clarify the interpretation of national rules adopted in order to implement them or when they are designed to supplement binding Union measures.

tory strength from government powers or capacities.[222] As Kilpatrick puts it, OMC does not constitute a hard law opportunity manqué; rather, soft law in this regard is shorthand for 'different from law (in its classical conception)', not 'less than law'.[223]

Nevertheless, this heavy reliance on various forms of soft law absolves the EU from jumping through the traditional hurdles required by the traditional legislative methods adopted under CCM (an identifiable formal legal basis for a proposed measure, the involvement of the European Parliament, etc). This leads to a vicious—or virtuous—cycle: the absence of formal measures means there is less need for formal structures. The more informal the structure, the less need there is for formal checks and balances—in particular, the less need there is for formal measures which are subject to the traditional vehicles of control, in particular judicial review.

E. Justification by Bootstrapping

Because of the absence of hard law, the traditional legal mechanisms to guarantee the legality of a measure—such as the need for a legal basis to ensure that the decision-maker has competence to act—become at one level less pressing. On the other hand, given the amorphous nature of the EES and the Lisbon and EU2020 strategies and their potential to invade areas of sensitive national sovereignty, it could be argued that there is an even greater need for justification for EU-level action. This brings us to our fifth observation. The justification for some action is derived from other EU instruments. So, for example, the basis for the Council Resolution of 1998 was the conclusions of the extraordinary European Council meeting on Employment of 20

222. S Borrás and K Jacobsson, 'The open method of coordination and new governance patterns in the EU' (2004) 11 JEPP 185, 188 and 199.

223. 'New EU Employment Governance and Constitutionalism' in G De Búrca and J Scott (eds), Law and New Governance in the EU and the US (Oxford, Hart Publishing, 2006).

and 21 November 1997. The justification for the Commission's scoreboard was the Nice European Council conclusions. The basis for the EU2020 strategy was the October 2009 European Council conclusions. This is justification by bootstrapping. It means that the foundations for further Union action for these demanding programmes is built on already shaky foundations.

IV. Conclusions

But do the shaky foundations for action actually matter? If the EU is able to deliver on the promise offered by these documents and put into practice the policies that they espouse, then what is there to worry about. If there are lingering concerns about legitimacy then these can be overcome by the role of the Member States in the European Council. Yet, this argument is weakened by the fact that review by national political processes is already attenuated. The argument is further undermined by the introduction by the Lisbon Treaty of a President of the European Council (Mr Van Rompuy) who already wields considerable power and influence.[224]

More fundamentally, the output legitimacy argument is undermined by the general perception that the Lisbon Strategy has been a failure. Even it had been a success a continued disregard of any formal legal basis would jeopardise one of the proclaimed successes of the Lisbon Treaty, namely the creation of a catalogue of competences for the EU. There is a further paradox here: as the Treaties move towards supporting greater use of the CCM, practice suggests a move towards greater

224. His role is defined only cursorily by Article 15(6) TEU: 'The President of the European Council:
shall chair it and drive forward its work;
shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission....
shall endeavour to facilitate cohesion and consensus within the European Council;
shall present a report to the European Parliament after each of the meetings of the European Council.
....'

intergovernmentalism. It is this intergovernmentalist methodology that the European Parliament, at least, attributes to the failure of the Lisbon Strategy. Guy Verhofstedt, leader of the Liberal group in the European Parliament and former Belgian prime minister noted:

The Lisbon Strategy, started in 2000, was based on intergovernmental cooperation. The intergovernmental method, based on best practices and peer review, is the complete failure of this strategy... If we continue like that, we shall talk again in ten years about Europe 2030, but we shall also see the failure of the 'Europe 2020' strategy if we continue with this loose intergovernmental approach.[225]

Even if EU2020 does deliver, the methodology nevertheless reinforces concerns that with the tentacles of EU entering into sensitive areas of national sovereignty, unaccountable EU institutions are requiring major shifts in national policy-making. Practice, even following the adoption of the Lisbon Treaty, has failed to address these concerns.

225. 'Parliament threatens to block "Europe 2020" plan', euractiv, 7 June 2010, available at < http://www.euractiv.com/en/priorities/liberals-threaten-block-europe-2020-plan-news-494914> accessed 19 July 2010.

Annex I

Year	Type of measure	Institution	Legal basis	Content	Other observations
1997					
20-21 Nov 1997	Extraordinary meeting of European Council at Luxembourg, Presidency Conclusions	European Council	None	EES guidelines agreed	
15 Dec 1997	Council Resolution on 1998 Guidelines[97]	Council	The conclusions of the extraordinary European Council meeting on Employment of 20 and 21 November 1997	(1) 4 pillars	
(2) 19 guidelines					
1998					
1999					
22 Feb 1999	Council Resolution on 1999 Guidelines[98]	Council	The conclusions of the extraordinary European Council meeting on Employment of 20 and 21 November 1997 and the Vienna European Council 11-12 Dec 1998	Largely repeated those of 1998, more emphasis on family friendly policies	

97 OJ 1998 C30/1.
98 OJ 1999 C69/2.

3-4 June 1999	European Council. Presidency Conclusions	European Council	None	Anticipation of the Lisbon strategy [99]	
2000					
13 Mar 2000	Council Dec 2000/228/ EC on employment guidelines[100]	Council	Art 128(2) EC	Amending slightly the 1999 guidelines	
23-4 Mar 2000	Lisbon European Council, Presidency Conclusions	European Council	None	Lays down goals and methods for Lisbon Strategy	
19-20 June 2000	Feira European Council, Presidency Conclusions	European Council	None	Follow-up to Lisbon European Council	
July 2000	Commission Social Policy Agenda[101]	Commission	None but reference to Lisbon strategy and its programme of action announced to the EP	(1) Virtuous cycle of economic and social policy (2) Social policy as a productive factor	
7-9 Dec 2000	Nice European Council	European Council	None	Sets social policy agenda for 2000-2005 based on modernising and improving the European Social Model	
2001					

99 11. The European Council welcomes the decision to convene a special meeting of the European Council on employment, economic reform and social cohesion (towards a Europe of innovation and knowledge) under the Portuguese Presidency in the spring of 2000 in order to review the progress made after the Cologne, Cardiff and Luxembourg processes.'

100 OJ 2000 L72/15

101 COM(2000) 379.

19 Jan 2001	Council Dec 2001/63/EC[102]	Council	Art 128(2) EC	Five horizontal objectives added to four pillars to reorient the EES towards the Lisbon Strategy	
February 2001	Commission Scoreboard on Implementing the Social Policy Agenda[103]	Commission	Nice European Council		
23-24 Mar 2001	Stockholm European Council	European Council	None	(1) Agreed to improve procedures so that the European Council's Spring meeting to become the focal point for an annual review of economic and social questions. (2) Sustainability added as a Lisbon objective	
15-16 June 2001	Göteborg European Council, Presidency Conclusions	European Council	None	Sustainable development strategy fleshed out	
25 July 2001	Commission governance white paper [104]	Commission	None (although reform of governance identified as one of its four strategic objectives in 2000)	New forms of governance including OMC but also sees role for CCM	
14 Dec 2001	Laeken European Council, Presidency Conclusions	European Council	None	Emphasis on full employment being primary objective of EES	

102 OJ 2001 L22/18.
103 COM(2001) 104. See also the Mid-term Review: COM(2003) 312.
104 COM(2001) 428.

2002					
18 Feb 2002	Council Dec. 2002/177/ EC[105]	Council	Art 128(2)EC	Broadly following 2001 guidelines	
15-16 March 2002	Barcelona European Council, Presidency Conclusions	European Council	None	(1) Emphasis on flexicurity (2) Greater coordination between social and economic dimension (3) EES to be simplified	
July 2002	Commission review of EES[106]	Commission	Nice European Council		
Sept 2002	Commission, streamlining the annual economic and employment cycles [107]	Commission			
2003					

105 OJ 2002 L60/60.
106 'Taking Stock of Five Years of the European Employment Strategy' COM(2002) 416.
107 COM(2002) 487.

14 Jan 2003	Commission, Future of the EES [108]	Commission		(1) Need for simplification (2) 3 overarching objectives (full employment, quality and productivity at work, cohesion and inclusive labour market), 11 priorities, emphasis on delivery and governance (2) Four pillars replaced by three overarching and interrelated objectives (full employment, quality and productivity and social cohesion/inclusion)	
20-21 Mar 2003	Brussels European Council, Presidency Conclusions	European Council	None	(1) 3-year perspective of employment guidelines which should operate in consistent way with BEPGs (2) Commission to establish European Employment Taskforce headed by Wim Kok to identify employment-related challenges (3) Welcomed establishment of Tripartite Social Summit for Growth and Employment[109]	
19 and 20 June	Thessaloniki European Council, Presidency Conclusions	European Council	None	Follow-up to the Spring European Council	Note the high intensity of the intergovernmental activity in this period.

108 'The Future of the European Employment Strategy (EES). A Strategy for Full Employment and better jobs for all' COM(2003) 6.

109 First meeting took place before the European Council.

July 2003	Council Dec 2003/578/ EC[110]	Council		(1) Three-year policy cycle introduced (2) Four pillars replaced by three overarching and interrelated objectives (full employment, quality and productivity and social cohesion/inclusion) (3) Ten specific guidelines	
16-17 Oct	Brussels European Council, Presidency Conclusions	European Council	None	Reiteration of need for effective social policies, in particular job creation	
Nov 2003	First Kok report, Jobs, Jobs, Jobs [111]	-		Need to accelerate implementation of necessary reforms of employment	
12-13 Dec 2003	Brussels European Council, Presidency Conclusions	European Council	None	Concurs with issues raised by Kok report[112]	
2004					
25-26 Mar 2004	Brussels European Council, Presidency Conclusions	European Council	None	Concern that 2010 targets will not be met unless pace of reform is speeded up	

110 OJ 2003 L197/13.

111 'Creating more employment in Europe'.

112 Namely: (1) increasing the adaptability of workers and enterprises; (2) attracting more people to the labour market; (3) more and effective investment in human capital; and (4) ensuring the effective implementation of reforms through better governance.

4 Oct 2004	Council Dec. 2004/740/ EC,[113] Employment Guidelines Second Kok report[114]	Council	Art 128(2) EC	2003 guidelines applied without alteration Recognised the failure of the Lisbon Strategy (too many targets, lack of ownership)	
2005					
February 2005	Commission Communication on the Social Agenda 2005-2010[115]	Commission	None	(1) Positive interplay between economic, social and employment policies (2) Promoting quality[116] (2) Modernising systems of protection (3) Taking account of cost of lack of social policy	
February 2005	Commission Communication on Lisbon relaunch,[117] including an Action Plan [118]	Commission			

113 OJ 2004 L326/45.

114 Facing the Challenge: The Lisbon Strategy for Growth and Employment. Report from the High Level Group chaired by Wim Kok (Luxembourg, OOPEC, 2004).

115 COM(2005) 33.

116 Commission, 'Employment and social policies: a framework for investing in quality' COM(2001) 313 and the progress report: COM(2003) 728. Cf G Raveaud, 'The European Employment Strategy: Towards More and Better Jobs?' (2007) 45 JCMS 411.

117 'Working Together for Growth and Jobs—a new start for the Lisbon Strategy' COM(2005) 24, 7. See also SEC(2005) 160, SEC(2005) 193.

118 SEC(2005) 192

23-4 Mar 2005	Brussels European Council	European Council	None	(1) Endorsed ECOFIN report on the implementation of the Stability and Growth Pact (2) Relaunched Lisbon strategy and welcomes Commission's approach (3) 3 priorities: (i) knowledge and innovation as engines for sustainable growth; (ii) making Europe more attractive to invest and work; (iii) more jobs for social cohesion	Significant shift of EES to a more liberal, supply-side direction, placing more emphasis on adaptability of workers, including more flexible contractual arrangements.[119]
16-17 June 2005	Brussels European Council, Presidency Conclusions	European Council	None	Adopted 24 integrated guidelines for growth and jobs (17-24 concern employment issues) based on Commission document 'Integrated Guidelines for Growth and Jobs'[120]	
12 July 2005	Council Dec 2005/600/EC[121] on employment guidelines	Council	Art 128(2)EC	(1) Three overarching objectives (full employment, quality and productivity, and social cohesion and territorial inclusion) [122] (2) Activities based on the 8 integrated guidelines (which themselves are annexed to the Decision)	

119 Rhodes, above n.23, 298.

120 COM(2005) 141. The microeconomic guidelines were re-ordered by the European Council but the Employment guidelines were adopted verbatim.

121 OJ 2005 L205/21.

122 This was followed up by Commission Communication 'Common Actions for Growth and Employment: The Community Lisbon Programme' (COM(2005) 330) focusing on 8 key measures, and Commission Communication 'Addressing the concerns of young people in Europe—implementing the European Youth Pact and promoting active citizenship' COM(2005) 206. This was followed up by the Annual Progress Report 'Time to Move up a Gear' COM(2006) 30.

2006					
23-24 Mar 2006	Brussels European Council, Presidency Conclusions	European Council	None	Emphasised European pact of gender equality	
18 July 2006	Council Dec 2006/544/EC [123]	Council	Art 128(2)	Approved 2005 guidelines	
22 Nov 2006	Commission Modernising Labour Law Green Paper[124]	Commission	None	Rethinking role of labour law in how it can evolve to support Lisbon Strategy	
2007					
8-9 Mar 2007	European Council, Presidency Conclusions	European Council	None	Anticipating flexicurity document	
21-2 June 2007	European Council, Presidency Conclusions	European Council	None	Anticipating flexicurity communication	Period of consolidation? Little innovation?
27 June 2007	Commission Flexicurity Communication [125]	Commission	None	(1) To achieve Lisbon objectives of more and better jobs, new forms of flexibility and security are needed. (2) Four flexicurity pathways proposed	

123 OJ 2006 L215/26.

124 'Modernising labour law to meet the challenges of the 21st century' COM(2006) 708. Outcome of communication can be found at COM(2007) 627.

125 'Towards Common Principles of Flexicurity: more and better jobs through flexibility and security' COM(2007)

10 July 2007	Council Dec. 2007/491/EC[126]	Council	Art 128(2)	Maintained 2005 guidelines	
20 Nov 2007	Commission Social Vision Communication [127]	Commission	None	Third way thinking, emphasis particularly on access and opportunities	
5-6 Dec 2007	Employment Affairs Council adopts common principles on flexicurity	Council	'In response to the 2007 Spring European Council mandate'		
14 Dec 2007	European Council, Presidency Conclusions	European Council	None	Preparing for 2008-10 Integrated Guidelines	
2008					
13-14 Mar 2008	European Council, Presidency Conclusions	European Council	None	European Council launches the second three-year cycle of the Strategy by confirming that the current Integrated Guidelines (BEPGs and Employment Guidelines) remain valid and should serve for the period 2008-2010	
2 July 2008	Commission, Renewed Social Agenda Communication[128]	Commission	None	Operationalises some of the ideas in 2007 Communication	

126 OJ 2007 L183/25.

127 'Opportunities, access and solidarity: towards a new social vision for 21st century Europe' COM(2007) 726.

128 'Renewed Social Agenda, Opportunities, Access and Solidarity in 21st Century Europe' COM(2008) 412.

15 July 2008	Council Dec 2008/618/ EC[129]	Council	Art 128(2)	New three-year cycle but content reflects 2005 cycle	As anticipated by Spring European Council
2009					
19-20 Mar 2009	European Presidency Conclusions	European Council	None	Anticipating EU2020	
May 2009	Prague Employment Summit	Troika presidencies + Commission		Agreed on (i) maintaining employment, creating new jobs and promoting mobility; (ii) upgrading skills and matching labour market needs; (iii) increasing access to employment.	
18-19 June 2009	European Council, Presidency Conclusions	European Council	None	(1) 'flexicurity' is an important means to modernise and foster the adaptability of labour markets	
	Council Dec 2009/536/ EC[130]	Council	Art 128(2) EC	Maintained 2008 guidelines	
29-30 Oct 2009	European Presidency Conclusions	European Council	None	(1) European Council 'looks forward to discussing a new European strategy for jobs and growth as part of the upcoming review of the Lisbon Strategy' (2) emphasis on active labour market policy	
2010					
25-26 Mar 2010	European Council, Presidency Conclusions	European Council	None	EU 2020 strategy launched	

129 OJ 2008 L198/47.
130 OJ 2009 L180/16.

17 June 2010	European Council. Presidency Conclusions	European Council	None	Confirmed EU2020 and indicators set	

3. Ponencia R. Grote

The Legal Instruments for the Implementation of Equality Policies in the European Union

Prof. Dr. Rainer Grote, LL.M.

I. Introduction

The European Union has been involved in the formulation of equality policies and the enactment of anti-discrimination legislation since the establishment of the European Communities more than half a century ago. The prohibition of discrimination based on nationality was vital for the creation of a common internal market based on the free movement of goods, services, persons and capital. However, the European Community also played a prominent role in the progressive implementation of sex equality right from the start. This was due to the

lobbying of some member states – France in particular – which pushed for the harmonization of the social costs of production in order to level the playing field for the industries and businesses of the member states once the barriers to the free movements of goods, persons and capital and person were removed. At the time of treaty negotiations France had already introduced a number of costly social policies at home which would have put French business in the common market at a severe competitive disadvantage unless the relevant costs of production were made subject to mandatory harmonization at Community level. The principle of equal pay for equal work for men and women was one of these policies. The French delegation succeeded in persuading the other parties to the negotiations to include this policy in the "social provisions" chapter of the new Economic Community. As a result, the Treaty establishing the European Economic Community (TEC) enshrined in its chapter on social policy the duty of Member States "to ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers."[130]

The provisions of the social chapter and the principle of equal pay in particular proved to be popular with the citizens of the Community as well as with its organs, including the European Court of Justice, which laboured successfully to establish the equal treatment of men and women as a fundamental principle of Community law. By strengthening the "progressive" role of the Community in promoting equality between men and women in the workplace, the Community organs were able to demonstrate their commitment to a "social dimension" of the Community and thus to deflect at least some of the criticism of the internal market as a capitalist plot. The treaty revisions of the 1990's established the equality between men and women as one of the main

130. Art. 119 Treaty establishing the European Economic Community.

objectives of the Community.[131] It also found its way into the text of the Charter of Fundamental Rights of the European Union adopted in Nice in December 2000, which in its Article 23 provides that the "equality between men and women must be ensured in all areas, including employment, work and pay."

By contrast, it took several decades before the European Union started to push for a more general application of the equality principle. The Treaty of Amsterdam introduced a new Article 13 in the TEC which authorized the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 21 (1) of the Charter of Fundamental Rights contains an even more broadly framed prohibition of "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation".

II. Overview of the legal instruments for the implementation of equality policies

In deciding matters relating to the implementation of the principles of equality and non-discrimination in the European Union, policymakers and judges alike must have regard to a number of different legal instruments. In accordance with the hierarchy of legal sources in the Union legal order, the foundation Treaties of the European Union constitute the primary basis for the introduction of equality policies. The Lisbon Treaty has reduced the number of these treaties to two, the Treaty on European Union (TEU) and the Treaty on the Functioning of the Eu-

131. The Treaty of Amsterdam proclaimed the equality between men and women as one of the tasks of the Community listed in Article 2 TEC, and introduced a new paragraph (2) in Article 3: "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women."

ropean Union (TFEU). In doing so, the drafters of the Lisbon Treaty have preserved the bulk of the provisions of the TEU and the TEC on equality and non-discrimination while at the same time clarifying and extending their scope of application. According to the new Article 2 of the TEU, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, which are common to a society in which, among other things, non-discrimination and equality between men and women prevail. Art. 3 TEU (the former Article 2), commits the EU to the fight against social exclusion and discrimination and the promotion of social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child. In addition, the new Article 10 FTEU places the Union under a broadly framed general obligation with regard to future lawmaking by providing that "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." More specifically, Art. 19 TFEU reaffirms the authorization of the Council previously contained in Art. 13 TEC to take, by unanimous decision and after obtaining the consent of the European Parliament, appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In addition, the European Parliament and the Council may in the ordinary legislative procedure adopt the basic principles of so-called Union incentive measures which support the Member States in the achievement of the aims stated in Article 19 by other means than the harmonization of their laws and regulations. The specific provisions on the equality of men and women with regard to opportunities in the labour market, their equal treatment at work, and the implementation of the principle of equal pay for male and female workers (ex-Articles 137, 141 TEC) have been shifted to Articles 153, 157 TFEU.

But the Lisbon Treaty has also added a potentially important new dimension to the existing legal instruments by recognising, in the amended Art. 6 TEU, the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (FRC) as having the same legal value as the foundation Treaties. This matters because Art. 21 of the Charter contains a broadly framed prohibition of any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation which is directly effective within the scope of application of the Charter, i.e. with regard to all measures adopted by the institutions and bodies of the Union and also in respect to action taken by the authorities of the Member States whenever they are implementing Union law (see Art. 51 (1) FRC). In addition, Article 23 makes clear that the principle of equality between men and women must be ensured in all areas, and no longer be limited in its application to issues concerning employment, work and pay. Moreover, Article 23 (2) expressly states that the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. How this is going to affect the hitherto rather restrictive jurisprudence of the ECJ on the permissible scope of positive action in favour of women in the public sector under the Equal Treatment Directive[132] remains to be seen. However, it follows from the hierarchy of legal sources in the Union legal order that the Equal Treatment Directive, like all other provisions of EU secondary law, has to be interpreted in the light of and in accordance with the requirements of the FRC insofar as its scope of application is concerned.

132. See A. Numhauser-Henning, On Equal Treatment, Positive Action and the Significance of a Person's Sex, in: A. Numhauser-Henning (ed.), Legal Perspectives on Equal Treatment, The Hague 2001, p. 217 ss. and section III. below.

The relevant EU secondary legislation covers three broad areas, namely sex equality, non-discrimination on the grounds of racial or ethnic origin, and non-discrimination on the other grounds set out in Art. 19 TFEU (former Article 13 TEC). The main instruments concerned are the Equal Pay Directive[133] and the Equal Treatment Directive[134], which implement Art. 157 TFEU (ex-Article 141 TEC); the Racial Equality Directive, which implements the principle of equal treatment irrespective of racial or ethnic origin[135]; and the so-called Framework Directive which aims to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation.[136]

Although not constituting a formal source of law, the decisions of the EU judiciary, and in particular of the Court of Justice of the European Union (ECJ) in the preliminary rulings procedure, have played an important role in the shaping of EU law in the area of equality and non-discrimination. This is true first and foremost with regard to sex equality which the ECJ, starting with its seminal decision in Defrenne v Sabena[137], established early on as one of the fundamental principles of Community/Union law. Since then, numerous decisions have clarified the scope and the meaning of the equal pay and equal treatment provisions in the Treaty as well as of the Equal Pay and Equal Treatment Directives. By contrast, the case law of the ECJ on the Racial Equality Directive and the Framework Directive has hitherto been scant. So far, there has just been one ECJ decision on the scope of the Racial Equality Directive.[138]

133. Directive 75/117, OJ [1975] L 45/19.

134. Directive 76/207, OJ [1976] L 39/40, as amended by Directive 2002/73, OJ [2002] L 269/15.

135. Directive 2000/43, OJ [2000] L 180/22.

136. Directive 2000/78, OJ [2000] L303/16.

137. C-43/75 Defrenne v Sabena [1976] ECR 455.

138. C-54/07, Ferryn, judgment of 10 July 2008, in which the Court adopted a broad interpretation of the concept of "direct discrimination" in the context of the Directive.

The Lisbon Treaty also provides for the accession of the EU to the European Convention on Human Rights (Art. 6 (2) TEU). Fundamental rights as guaranteed by the European Convention for the Protection of Human Rights (ECHR) had already been recognised as general principles of the Union's law (see Art. 6 (3) TEU). This adds another layer to the implementation of the principles of equality and non-discrimination in the legal system of the EU. While the scope of the equality guarantee in the Convention has historically been limited to the equal enjoyment of the rights and freedoms set forth in the Convention, it is likely to receive a far wider application as a result of the Twelfth Protocol which provides that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". The growing acceptance of this Protocol by Member States – which so far has been limited to 7 EU countries[139] – is likely to have a direct impact on the level of protection accorded to the principles of equality and non-discrimination in the Union law proper since Art. 52 (3) of the FRC expressly provides that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."

III. Gender Equality as a Model for EU Equality Policies in Other Areas

As results from the overview above, practically all the relevant secondary EU legislation in the fields of equality and non-discrimination has taken the form of directives. As is typical for directives, they are binding on Member States as to the results which are to be achieved

139. Cyprus, Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain (as of 1/9/2010).

by the legislation but leave to the national authorities the choice of form and methods. The implementation of the directives is subject to the oversight by the European Commission which, if it deems that the directive has not been implemented in time or in full, may bring proceedings against the Member State concerned under Art. 258 TFEU for non-fulfilment of its treaty obligations. It is thus the Court of Justice which, either upon the initiative of the Commission in the non-compliance procedure under Art. 258 TFEU or upon the request of a Member State court for the interpretation of the directive in the preliminary rulings procedure (Art. 267 TFEU), has the final word on the meaning and the scope of the directive concerned.

Since the recognition, in the already mentioned Defrenne decision, of the principle of equal pay as one of the foundations of the Community legal order, gender equality has been at the forefront of EU social policy. It has been the subject of several EU directives as well as of a series of subsequent Action Programmes of the European Union. It is therefore not surprising that the policies on gender equality, and particularly the Equal Treatment and the Equal Pay Directives, have served as a model for the shaping of equality policies in the fields of racial and ethnic discrimination and in the other areas mentioned in Art. 19 TFEU (ex Article 13 TEC), which only became a major concern for Community/Union organs in the late 1990's.

The main purpose of the Equal Treatment Directive (ETD) is to put into effect the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training, as well as working conditions (Art. 1 (1) ETD). In order to achieve this purpose, the Directive prohibits any discrimination on grounds of sex, either directly or indirectly, in relation to the matters covered by the Directive (Art. 2 (1) ETD). However, the Directive originally did not define the concept of indirect discrimination. The necessary clarification was left to the case law of the ECJ which dealt with

the issue in a series of cases,[140] before the concept was formally codified in the Burden of Proof Directive[141] and then by way of amendment included in the Equal Treatment Directive in 2002.[142] The amended Directive now provides that indirect discrimination shall be deemed to exist where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. It has also widened the scope of the Directive insofar as harassment and sexual harassment are now expressly deemed to constitute discrimination on the grounds of sex and therefore prohibited (Art. 2 (3) amended ETD)[143].

Nor does the Directive clarify the concepts of "equality of treatment" and "non-discrimination" which form the cornerstone of the whole legislation. As is well known, equality can be conceived in vastly different terms, ranging from a more a formal definition of equality, which affirms that like cases should be treated alike unless a convincing objective reason for treating them differently can be shown, to more substantive concepts which openly argue for redistributive measures in favour of hitherto underprivileged groups in order to promote a greater degree of equality in practice.[144] Apart from banning indirect as well as direct discrimination – and thus implicitly rejecting a purely formal concept of equal treatment – the Equal Treatment Directive

140. On the development of the Court's jurisprudence on this issue see E. Ellis, EU Anti-Discrimination Law, Oxford 2005, pp. 91-94.

141. Directive 97/80, OJ [1998] L 14/6.

142. Directive 2002/73, OJ [2002] L 269/15.

143. According to Art. 2 (2) amended ETD "harassment" covers any unwanted conduct related to the sex of a person which occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating, or offensive environment, while "sexual harassment" refers to any conduct of a sexual nature which has such purpose or effect.

144. See Ellis, Anti-Discrimination Law (note 11 above), pp. 2-7.

does not take sides in this debate; neither the recitals nor the text of the directive make reference to any specific concept of equality.

In subsequent litigation, the Court of Justice has adhered to a somewhat limited concept of equality, in particular with regard to the permissible scope for so-called positive action measures in the public employment sector. Art. 2 (4) ETD in its original wording expressly stated that the Directive should not be interpreted as excluding measures designed to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in employment and vocational training. Similarly, Art. 141 TEC as amended by the Treaty of Amsterdam – which has now become Art. 157 of the TFEU – provided that "the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers." However, in a number of cases concerning legislative schemes giving priority to the appointment and promotion of women in sectors of the public service where they are underrepresented, the Court of Justice has rejected the view that these provisions provide a sufficient basis for national legislation that automatically grants preference to candidates belonging to the under-represented sex.[145] By contrast, it has accepted domestic legislation which, although requiring that priority is normally given to equally competent and suitable female candidates for public sector posts in which women are underrepresented, allows for the non-application of the preference rule in cases in which reasons specific to an individual male candidate tilt the balance in his favour (a so-called 'flexible' quota system).[146] These rulings were based on a reading of

145. C-450/93, Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051.

146. C-409/95 Hellmut Marschall v Land Nordrhein-Westfalen [1997] ECR I-6363; C-158/97 Georg Badeck et al. v Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Lan-

Art. 2 (4) ETD which stresses the equality of opportunity mentioned in that provision as the guiding principle in the implementation of the principle of equal treatment underlying the Directive, and thus also in the determination of the permissible scope for positive action schemes. In the view of the Court, any scheme which aims to grant an automatic or rigid preference to one sex over the other in employment matters with a view to reducing existing inequalities exceeds the limits for positive action drawn by the ETD and the primary Union law which it is designed to implement since it substitutes for the equality of opportunity envisaged in Art. 2 (4) ETD an equality of results which is only to be arrived at by providing such equality of opportunity.[147]

IV. Scope of the Racial Equality Directive and the Framework Directive

The Racial Equality Directive (RED) and the Framework Directive (FD) were adopted only in 2000, at a time when there was growing international concern about a resurgence of xenophobia and racist violence in different parts of Europe. The Commission wanted to make sure that legislative action on racial and ethnic discrimination, as well as on the other forms of discrimination on which the Community had been given a mandate to act by the new Article 13 TEC (now Article 19 TFEU), was swiftly adopted so that it formed part of the acquis communautaire to which the countries in Central and Eastern Europe which were applying for EU membership at the time would be required to accede.[148]

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des Hessen [2000] ECR I-1875; C-407/98 Katarina Abrahamsson and others v Elisabet Fogelqvist [2000] ECR I-5539.

147. C-450/93 Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051, para. 23. The wording of the Directive with regard to positive action has subsequently been amended. Art. 2 (8) ETD now authorizes Member States to "maintain or adopt measures within the meaning of Article 141 (4) of the Treaty with a view to ensuring full equality in practice between men and women."

148. Ellis, Anti-Discrimination Law (note 11 above), p. 29.

The Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin was adopted on 29 June 2000, thus preceding the adoption of the Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, which covers the other prohibited grounds of discrimination set out in Article 13 TEC (now Article 19 TFEU), by several months. While there was little controversy surrounding the content of the Racial Equality Directive, amendments to the draft of the Framework Directive were being introduced virtually until the last minute of the Council negotiations, raising questions on the validity of the whole instrument, as a consultation of the European Parliament on the final draft submitted to the Council vote never took place.[149]

The formal structure of both Directives is very similar. They aim to put into effect in the Member States the principle of equal treatment (Article 1 RED; Article 1 FD). However, while the Framework Directive establishes a general framework for combating discrimination on grounds of religion or belief, disability, age or sexual orientation with regard to matters of employment and occupation only (Articles 1, 3 FD), the scope of application of the Racial Equality Directive is considerably broader: it aims to protect and to promote equal treatment irrespective of racial or ethnic origin not only with regard to employment and vocational training, but also in matters concerning social protection, including social security and healthcare, education, and access to goods and services which are available to the public, including housing (Article 3 RED).

The conduct which the framework legislation seeks to eliminate is defined in both Directives by reference to the concepts of direct discrimination, indirect discrimination, and harassment. Direct discrimination

149. Ellis, Anti-Discrimination Law (note 11 above), p. 211/212.

shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any one of the prohibited grounds, whereas indirect discrimination is deemed to exist in cases where the use of an apparently neutral provision, criterion or practice would put persons belonging to the protected group at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary. Harassment, on the other hand, is defined as an unwanted conduct related to any of the prohibited grounds which takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment (Art. 2 (2), (3) RED; Art. 2 (2), (3) FD).

However, differences of treatment based on one of the prohibited grounds which are linked to specific occupational requirements, like the requirement of unimpaired eyesight for pilots, shall not constitute discrimination, provided that the requirement serves a legitimate purpose and is proportionate to the aim pursued (Article 4 RED; Article 4 FD). The Framework Directive contains an additional "savings clause" which makes sure that age requirements in domestic legislation which reflect legitimate employment policies or labour market and vocational training objectives are preserved so long as they are proportionate to the objectives pursued (Article 6 FD). In addition, both Directives state unambiguously that they do not exclude differences of treatment based on nationality, and leave unaffected provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of the Member States (Art. 3 (2) RED; Art. 3 (2) FD). This creates problems in particular with regard to the implementation of the Racial Equality Directive, as discrimination of members of certain ethnic groups can easily be disguised as different treatment based on nationality.

The relationship between equal treatment and positive action programmes designed to reduce existing inequalities is addressed by both Directives in similar terms. Measures which are designed to prevent or compensate for disadvantages linked to any of the prohibited grounds may be adopted or maintained if they pursue the aim of "ensuring full equality in practice" (Article 5 RED; Article 7 FD). This falls well short of requiring strict proportionality between the means employed and the aim of full equality as a precondition for the compatibility of such programmes with Union law. Nor do the Directives themselves mandate the establishment of such programmes. This is in line with the general character of the framework legislation which aims merely to fix minimum standards for the implementation of the equal treatment principle, without excluding more far-reaching measures on the part of the Member States (Article 6 RED; Art. 8 FD).

Under the Directives, Member States are obliged to maintain or, if necessary, to introduce the appropriate judicial and/or administrative procedures, including conciliation procedures, for the effective enforcement of the obligations set out in the Directives by individuals whose right to equal treatment has allegedly been infringed (Article 7 RED; Article 9 FD). One of the crucial issues in equal treatment cases, in particular with regard to situations involving indirect discrimination, is the burden of proof. The Directives try to make life easier for future plaintiffs by prescribing that it is sufficient for victims of an alleged discrimination to show the facts from which it may be presumed that there has been direct or indirect discrimination in order for the burden to prove that there has been no breach of the principle of equal treatment to shift to the respondent (Article 8 RED; Article 10 FD). The recitals to the Directives make it clear that "facts" from which the existence of a discrimination may be presumed shall include the relevant statistical evidence.

The Member States shall implement the obligations under the Directives not only through the amendment and modification of their domes-

tic laws and regulations (Article 14 RED; Article 16 FD). They are also under an obligation to raise the awareness of the public authorities and the public in matters of equal treatment through the dissemination of the relevant information to all the persons concerned (Article 10 RED; Article 12 FD), the promotion of a dialogue between the social partners (i.e. employers associations and unions) with a view to fostering equal treatment (Article 11 RED; Article 13 FD), and the strengthening of the dialogue with those non-governmental organisation which are specifically committed to the fight against discrimination on any of the prohibited grounds (Article 12 RED; Article 14 FD). In addition, the Racial Equality Directive obliges the Member States to designate a body or bodies for the promotion of equal treatment of all persons irrespective of racial or ethnic origin (so-called equality bodies). These bodies need not be created from scratch but may also be established as departments within already existing national agencies for the defence of human rights. Their activities shall include the provision of independent advice and assistance to victims of discrimination, the conduct of independent surveys concerning discrimination, and the publishing of independent reports, and making of recommendations on any issue relating to discrimination (Article 13 RED).

Member States were given until 19 July 2003 and until 2 December 2003, respectively, in order to adopt the laws, regulations and administrative provisions necessary to comply with the Racial Equality Directive and the Framework Directive (Article 16 RED; Article 18 FD). In relation to disability and age, however, the Framework Directive allowed Member States an additional three years to transpose the relevant provisions into domestic law (Article 18 FD).

After the entry into force of the UN Convention on the Rights of Persons with Disabilities (CRPD) on 3 May 2008, the European Commission has proposed a new directive against discrimination outside employment on grounds of religion or belief, disability, age and sexual

orientation. However, at the time of writing no agreement had yet been reached on the new instrument.

V. Effectiveness of the Existing Legal Instruments

The secondary legislation which has been enacted so far by the Community/Union organs for the implementation of the equality policies mandated by the Treaty has taken exclusively the form of directives. The choice of directives, as opposed to regulations, limits the binding effect of the legislation on the Member States, which are left with considerable discretion as to the form and methods to be used in order to achieve the results laid down by the directive, and do not produce any horizontal direct effect, thus seriously limiting the practical significance of the principles and rules in question.[150] In the case of the Racial Equality Directive and the Framework Directive this problem is compounded by the fact that they expressly define themselves as "framework legislation" (Article 1 RED; Article 1 FD) which merely intend to lay down some "minimum requirements" (Article 6 RED; Article 8 FD) with a view to putting into effect the principle of equal treatment. Moreover, the scope of application of the Framework Directive has so far been limited to matters of employment, vocational training and working conditions. It may be questioned whether the normative flexibility and the (partially) reduced scope of the Directives is really commensurate with the priority accorded by the Treaty and the political organs of the Union to the effective implementation of the principles of equal treatment and non-discrimination in the areas in question.

It should also be noted that the Directives do not define the prohibited grounds for discriminatory treatment. Thus the Racial Equality Directive contains no definition of the elusive term 'racial or ethnic

150. See Ellis, Anti-Discrimination Law (note 11 above), p. 210.

origin'. The recitals to the Directive acknowledge the highly problematic character of the concept by expressly stating (in Recital 6) that the European Union "rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories." Even more elusive is the notion of "ethnic origin". Although one may assume at first sight that 'race' refers primarily to physiological distinctions between people whereas 'ethnicity' is more closely linked to distinctions of a sociological, linguistic and cultural character, the distinction is not that clear-cut, given that there is widespread consensus today that 'race' is essentially a social and ideological construct which seeks to provide political justification for the domination of one group over another but lacks any 'objective' or scientific basis.[151] As regards 'ethnic origin', the case law of the courts in Member States which already have an anti-discrimination legislation in place (like the UK), seems to suggest that there is no straightforward definition of that concept, either. Rather a number of historical, sociological and cultural criteria must be carefully considered in order to distinguish ethnic groups from other groupings, e.g. political or religious communities.[152] It has already been noted that the application of the concept will raise difficult issues with regard to the distinction between ethnic discrimination and differences of treatment based on nationality, which remain permitted under the Directive.

The same uncertainty surrounds the other prohibited grounds mentioned in Article 19 TFEU (ex Article 13 TEC). None of them has been defined more precisely in the Framework Directive adopted to combat discrimination based on religion or belief, disability, age, and sexual

151. See S. Fredman, Combating Racism with Human Rights: The Right to Equality, in: S. Fredman (ed.), Discrimination and Human Rights: The Case of Racism, Oxford 2001, p. 10.

152. In the relevant case law of the British courts, the Sikhs and the Roma, or ‚traveller' community, have thus been recognised as ethnic groups, while this status has been denied to Rastafarians and Muslims, see Ellis, Anti-Discrimination Law (note 11 above), pp. 31/32.

orientation in employment and vocational training matters. Given the haste in which the framework legislation was adopted, this is not really surprising. In relation to 'religion or belief', some guidance may be obtained from the case-law of the European Court of Human Rights on the scope of Article 9 of the European Convention of Human Rights, which has adopted a rather broad view of the freedom of religion or belief protected by that provision.[153] Nevertheless, the limitation of the Directive to religion or belief, which excludes political opinions from the protection of the non-discrimination principle, remains problematic, although its respects the limits drawn by the enabling treaty provision. Even more problems seem bound to arise with regard to the interpretation of the concepts of 'disability', 'age' and 'sexual orientation', for which few precedents in national and international law exist. Much discretion has therefore been left to the European Court of Justice. Much as it has done with regard to sex discrimination, the Court will have the task to articulate sensible principles in the other fields of the non-discrimination law which the authorities and courts of the Member States will have to follow in the application of the Directives. Until it does so, however, the present uncertainty surrounding the anti-discrimination law in the fields of racial equality, religion or belief, disability, age and sexual orientation will continue. So far, the Court has only dealt in greater detail with the concept of 'disability' in the Framework Directive by deciding, in the Chacón Navas case, that disability has to be to distinguished from 'sickness', implying that short-term or temporary impairment of a person's judgment does not per se constitute an intellectual disability.[154]

Despite these weaknesses, the Directives constitute real progress in the fight against discrimination. They clearly define the types of conduct which are to be outlawed with regard to the principle of equal treatment

153. See Kokkinakis v Greece, Judgment of 25 May 1993, Series A, No. 260-A.

154. C-13/05 Sonia Chacón Navas v Eurest Colectividades SA, judgment of 11 July 2006.

in the covered areas. They are thus capable of being invoked by individual litigants to ensure that both direct and indirect discrimination are banned with regard to those matters to which the Directives apply.[155] Even within the limited context of employment and occupation, to which the Framework Directive – unlike the Racial Equality Directive – is limited, there is no doubt that the provisions of the Directive have quite an extensive application.[156]

Similarly, by imposing a duty on the Member States to ensure that judicial and administrative procedures are available within their domestic legal systems for the enforcement of the obligations under the Directives, and that organisations (such as NGOs and trade unions) which have a legitimate interest in ensuring that their provisions are complied with are given legal standing to bring cases on behalf or in support of complainants, the Directives mandate important procedural reforms which are central to the successful implementation of the substantive anti-discrimination law in practice. The same applies to the rules on the reversal of the burden of proof with regard to the identification of direct and indirect forms of discrimination once the complainant has established facts from which it may be presumed that there has been direct or indirect discrimination, since discriminatory attitudes and practices nowadays are routinely disguised.

In institutional terms, the equality bodies envisaged by the Racial Equality Directive also play a potentially vital role in ensuring that equal treatment and non-discrimination become and remain a central part of the national human rights agenda. It has convincingly been argued that the lack of such an independent monitoring body under the Framework Directive is one of the Directive's major shortcomings.[157]

155. Ellis, Anti-Discrimination Law (note 11 above), p. 215.

156. R. Whittle, The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective, European Law Review 27 (2002), p. 320.

157. Whittle, Framework Directive (note 27 above), p. 325.

VI. Conclusion

The European Union has a long and rather successful tradition in promoting greater equality between the two sexes, in particular in matters related to employment and occupation. Over the last decade, it has also assumed a greater role in the fight against discrimination outside the area of gender equality. However, its efforts in this respect are still far from comprehensive, as can easily be shown by the limited number of grounds on which anti-discrimination action of the EU is possible under Article 19 TFEU, when compared with anti-discrimination clauses in contemporary human rights treaties like Article 1 of the Twelfth Protocol to the European Convention on Human Rights. In addition, important conceptual uncertainties continue to exist concerning the material scope of the action to be taken, as is evident in the discussion whether the EU equality policies should extend to areas other than employment and occupation, which has been the case so far only in relation to racial and ethnic discrimination.

There also seems to exist a certain reluctance on the part of the Member States to accept a greater role of the EU in the promotion of equal treatment policies which go beyond the "traditional" policies in favour of greater sex equality at the workplace. As the most recent reports of the Fundamental Rights Agency of the European Union show, the transposition of the Racial Equality Directive and the Framework Directive into the domestic legal systems of the Member States has often been slow and incomplete, and their practical impact remains limited.[158]

158. See European Agency for Fundamental Rights, The Impact of the Racial Equality Directive, March 2010, p. 21; Annual Report 2010, pp. 92-103 (both reports are available at http://fra.europa.eu).

Despite these difficulties, the involvement of EU in the area of non-discrimination remains vital and indispensable: while the principles of equal treatment and non-discrimination also form a central part of modern human rights law, the intervention of international human rights bodies on these issues will in most cases remain limited, in accordance with the limited powers of supervision these bodies have been given. Discrimination, however, constitutes in many cases a structural problem which is deeply rooted in administrative as well as social practices and attitudes. The European Union, with its impressive legislative machinery and its well-established and resourceful monitoring bodies (Court of Justice, European Commission, Fundamental Rights Agency) seems far better equipped to tackle the underlying systemic roots of discrimination than any other existing supranational or international institution.[159]

159. It is therefore no accident that in its seminal decision on the discrimination of Roma children in the Czech school system the European Courts of Human Rights, when applying the non-discrimination principle laid down in Article 14 of the Convention, drew heavily on concepts like indirect discrimination and reversal of burden of proof on the basis of statistical evidence in discrimination cases which had already been firmly established in the case-law of the European Court of Justice and in European Union legislation at the time, see Case of D.H. and Others v the Czech Republic, Judgment of 13 November 2007 (Grand Chamber), paras. 81-91, 187 (available at http://cmiskp.echr.coe.int.).

4. Ponencia K. Pieters

The EU 2020 strategy: building a more reliable pattern to evaluate gender equality in corporate governance

Dr. K. Pieters[160]

1. Introduction

The European Commission (Commission) released its Communication 'Europe 2020 A strategy for smart, sustainable and inclusive growth' on 3 March 2010 in which the Commission emphasised the importance of strong European values such as democratic institutions, respect for

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the environment, cultural diversity and respect for gender equality.[161] About gender equality, the Commission exposes some structural weaknesses in the European Union (EU) such as the lower percentage of working women compared to working men.

Moving out of the crisis is the immediate challenge, but the biggest challenge is to escape the reflex to try to return to the pre-crisis situation. Even before the crisis, there were many areas where Europe was not progressing fast enough relative to the rest of the world: In spite of progress, Europe's employment rates – at 69% on average for those aged 20-64 – are still significantly lower than in other parts of the world. Only 63% of women are in work compared to 76% of men.

The Commission concludes that policies to promote gender equality will be needed to increase labour force participation thus adding to growth and social cohesion. Therefore, the EU must act now, since the EU's workforce is about to shrink compared to the United States (US) and Japan. A raise in the employment rate of women could partially help to solve the problem. Also at national level, the Member States will need to increase gender equality. The Commission, however, did not indicate any further specific measures to reach these objectives in its Communication.

The European Parliament (Parliament) has criticised the Commission's Communication in its resolution of 15 May 2010.[162] The Parliament is of the opinion that the plans of the Commission have been designed without taking into account a gender perspective. The Parliament states that women have been largely excluded from the decision-making on economic and financial recovery measures. The Parliament remarks

161. Communication from the Commission of 3 March 2010, Europe 2020 A strategy for smart, sustainable and inclusive growth, COM (2010) 2020.

162. See document number B7-0266/2010 at http://www.europarl.europa.eu.

that while in a first phase of the global economic crisis male-dominated sectors of the economy are particularly hit (such as the car industry, construction industry, etc...) it is obvious that the middle- and long-term effects of the global economic crisis will have a serious effects on sectors where women work, in particular public sectors such as social, health and care services. Therefore the Parliament asks for a new, stronger and better targeted EU Recovery Plan which is gender-equality streamlined in all of its components and further supports the proposal of the Spanish Presidency to set a gender-equality headline target for the EU 2020 Strategy. Further the Parliament insists on a specific chapter on gender equality in the Strategy, complementing the gender mainstreaming principle; points out that such a specific chapter should address all issues of the 2020 Strategy specifically aimed to contribute to greater equality between women and men, such as review of social protection systems with a view to abolish elements that generate gender inequalities, securing better working conditions in sectors where women work, decrease involuntary part time unemployment, gender equality in training and education etc... Finally the Parliament calls for a target to reduce the gender pay gap to 0-5% by 2020.

There are many studies about the influence of women in companies, but not about the influence of women in senior management positions. The purpose of this article is to put emphasis on the importance of equal representation of men and women in senior positions in the business society. The under-representation of women on boards of directors has been recognised as a problem in countries across the globe. Boards of companies around the world are under growing pressure to choose female directors. The under-representation of women in the board room of company's results from complex causes. Dezso and Ross examined the influence of women in senior management.[163] In 1992

163. C. Dezso and D. Ross, Girl Power: Female Participation in Top Management and Firm Performance, Working paper , Maryland University of Maryland and Columbia Business School 2008, pp. 1-36.

0.2 % of the firms had a female chief executive officer (CEO), while in 2006 6 % of the firms had a female CEO. They point at the fact that female participation in top management varies considerably by industry. Consumer-oriented industries, the financial services sector and the 'new economy' have the highest rates of female participation. Traditional industries like agriculture, petroleum, natural gas and shipping containers have the lowest.[164]

This article aims at finding causes of the lack of female participation in top management positions and attempts at finding solutions to improve female participation in top management positions. After this introduction (1), some basic facts about women in the board room will be offered (2). Second some positive and negative aspects of female participation in corporate governance will be presented (3). Next, the legal position of women at European level will be analysed (4) after which the main problems/causes of the lack of female participation in top management will be presented (5). The next paragraph of this article (6) will look for solutions to improve the participation of women at corporate governance level in Europe. Finally, some conclusions will be drawn (7).

2. Some basic facts about women in corporate governance

2.1. Definition of corporate governance

Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through

164. C. Dezso and D. Ross, at p. 10.

which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.[165]

Parties involved in corporate governance include the CEO, the board of directors, management, shareholders and the auditors. A CEO is the corporate officer at the top of a company in charge of total management of an organisation. The CEO's duty has two dimensions: he or she facilitates business outside of the company (external duty) and also guides employees and other executive officers (internal duty). In some Member States, there are two boards presided by two different individuals. The executive board takes care of the daily business of the company and the supervisory board controls the purpose of the business. The CEO presides over the board and the chairman presides over the supervisory board. The board of directors often plays a key role in corporate governance. It is their responsibility to endorse the organisation's strategy, develop directional policy, appoint, supervise and remunerate senior executives and to ensure accountability of the organisation to its owners and authorities.[166]

2.2. Facts around the world and in Europe specifically

In the US in 2007, women held 14.8 percent of the Fortune 500 corporate board seats. In Canada in 2006, 10.6 percent of the corporate board seats were occupied by women; in Australia 8.7 percent, in Japan 0.4 percent. In 2005, Europe had 8 percent women in the boardroom. This number increased by 2009: 9.7 percent of the corporate boardroom seats of the EUs Top 300 companies were occupied by women. In Europe there is an enormous disparity of women in the boardroom between the different Member States.[167] The following percentages result

165. OECD Principles of 1999.

166. Source: Wikipedia 2010.

167. Data from the European Board Women Monitor 2008.

from a study done by the European Board Women Monitor in 2008: France has 7.6 percent women in the boardroom; Germany 7.8 percent; United Kingdom (UK) 11.5 percent; Italy 2.1 percent; Belgium 7 percent; Spain 6.6 percent; Portugal 0.8 percent; Norway 44.2 percent; Sweden 26.9 percent; Finland 25.7 percent and Denmark 18.1 percent. There are significant differences across the Member States. The Scandinavian countries have the highest female participation in the boardroom, followed by the UK and Germany. Another survey shows similar results even for CEO positions. Again Scandinavia leads, with 22% of female directors in Norway and 17% in Sweden. Anglo-Saxon countries follow closely, with 13% of female directors in the USA, 9% in Australia and 7% in the UK.[168]

3. Some positive and negative effects of female participation in corporate governance

The first question that should be answered is if it is really favourable to have women in the boardroom of a company. Some researchers such as Dezso and Ross, have empirically examined female participation in senior management in order to provide evidence on the relationship between firm quality and female participation in senior management. They made a distinction between participation of women in senior management below CEO level and in the CEO position. They used indicators such as the Tobin's Q, a standard measure of firm performance, defined as the ratio of the market value of a firm's assets to their replacement value. Dezso and Ross came to the conclusion that female participation in top management is strongly associated with firm quality, even after controlling for observable and unobservable, time-invariant firm characteristics and prior levels of firm quality.[169]

168. Ethical Investment Research Service, 2004. Z. K. Kroupova, 'The Role of Women in International Business World and in the Czech Republic', Acta Oeconomica Pragensia 4/2009, p. 35.

169. C. Dezso and D. Ross, p. 15.

Another interesting conclusion concerns the difference between female participation in senior management below CEO level and in the CEO position. Female participation in senior management below CEO level has a strong positive association with firm performance but having a female CEO has a neutral or negative effect.[170] Another study about women in senior management positions has been carried out by Adams and Ferreira.[171] Adams and Ferreira examined whether female directors affect the functioning of boards. According to their evidence, women have fewer attendance problems than men.

Moreover, having women directors on boards improves the attendance behavior of male directors. Boards with greater gender diversity meet more often and offer more performance-based pay to board members. Adams and Ferreira came to the conclusion that women have a positive impact on how boards are governed. In a 4-year study done by Catalyst of 353 Fortune 500 companies, it was concluded that companies with the highest representation of women on their top management experience better financial performance: the return on equity is 35 percent higher and the total return to shareholders is 34 percent higher. Higher profits are essential in times of global financial and economic crisis and women might even prevent other financial crises in the future.[172] A study carried out by McKinsey & Company Women Matter of 2007 concludes that companies with 3 or more women in senior management score higher than companies with no women at the top on 9 criteria of organisational excellence: leadership, direction, accountability, coordination and control, innovation, external orientation, capability,

170. C. Dezso and D. Ross, p. 20.

171. R. Adams and D. Ferreira, Women in the boardroom and their impact on governance and performance 2008, Working paper, University of Queensland, London School of Economics, CEPR and ECGI, 2008.

172. 'The Bottom Line: Connecting Corporate Performance with Gender Diversity' 2004, research report by Catalyst, New York, San Jose and Toronto.

motivation, work environment and values.[173] Other positive elements are that women are better managers when dealing with other people is critical and difficult and women offer more creative solutions. What about the negative aspects of women in the boardroom? Most studies about female participation in corporate governance only mention the positive aspects of having women on board. Deszo and Ross mention some negative effects of which the most notable are: women may be less effective, women dislike competitive environments such as found in the boardroom, diversity in gender may lead to diverse opinions, thus slowing down the decision-making process and some males resist working with females. Further Deszo and Ross came to the conclusion that having a female CEO has a neutral or negative effect. When companies hire a women to respond to political and social pressure to hire a woman at senior level, this might have adverse effects.

The woman, as the only female participant in the board, is under pressure to perform and the board itself underestimates the female participant, since she was only hired as a response to external pressure. This phenomenon is called 'tokenism'.

In conclusion it can be stated that the positive elements, and primary the fact that female participation in senior management results in higher profits, overshadow the negative elements.

4. The legal evolution of equal treatment of men and women at European level

In this paragraph, a chronological overview of interesting evolutions in the EU legislation and jurisprudence as regards gender equality will be presented. In 1957, equal pay for men and women was inserted

173. 'Women Matter: Gender diversity, a corporate performance driver' 2007, research report by McKinsey & Company, Paris.

in article 119 of the European Economic Community (EEC)-Treaty of Rome.

Article 119

Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers. For the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment. Equal remuneration without discrimination based on sex means: (a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and (b) that remuneration for work at time-rates shall be the same for the same job.

Article 119 EEC-Treaty on equal pay was recognised by the European Court of Justice (ECJ) as a provision having direct effect in the case Defrenne v Sabena.[174] The applicant brought an action before the Tribunal du Travail (Labour Court) in Brussels for compensation for the loss she had incurred in terms of salary, allowance on termination of contract and pension in comparison with male members of the crew performing identical duties. The Belgian appeal court referred the case to the ECJ for preliminary ruling. The ECJ replied that the principle of equal treatment contained in article 119 EEC-Treaty may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision grants to individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal

174. Case 43/75, Defrenne v Sabena, 1976 ECR 455.

pay for equal work which is carried out in the same establishment or service, whether private or public.

This basic rule was much later supported by secondary European legislation: Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[175] These directives were repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.[176]

It is interesting though to have a look at former Directive 76/207/EEC as it regards equal access of men and women to employment, including promotion. Already in 1976, it was defined that promotion to senior positions in companies should be equally accessible for men and women. Article 1 of Directive 76/207/EEC emphasises that the aim of the directive is to implement the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training, and as regards working conditions and, on certain conditions, to social security. This means that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.[177] Member States had to take the measures necessary 'to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal

175. OJ L 45 of 19 February 1975, pp. 19–20 and OJ 1976 L 39, pp. 40-42, amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, OJ 2002 L 269, p. 15.

176. OJ L 204 of 26 July 2006, pp. 23–36.

177. Art. 2 (1) and art. 5 (1) Directive 76/207/EEC.

treatment shall be abolished; (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended; (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision'.[178] The EU Council had to ensure the principle of equal treatment of men and women in matters of social security.[179]

In March 2009 the Spanish Tribunal Superior de Justicia de Galicia submitted an interesting preliminary question to the ECJ involving Directive 76/207/EEC.[180] The question is about a Spanish law that allows employed mothers to leave the work floor to feed the unweaned child, but does not mention the father. The Spanish judge wanted to know whether the Spanish law infringes the principle of equal treatment, which prohibits discrimination on grounds of sex, in other words whether the Spanish law is compatible with the Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The questions referred by the Tribunal Superior de Justicia de Galicia are as follows: Does a national law (specifically, Article 37.4 of the Workers' Statute) which recognises only employed mothers, but not employed fathers, as holders of the right to paid leave in respect of the feeding of an unweaned child infringe

178. Art. 5 (2) Directive 76/207/EEC.

179. Art. 1 (2) Directive 76/207/EEC.

180. Case C-104/09; Reference for a preliminary ruling from the Tribunal Superior de Justicia de Galicia (Spain) lodged on 19 March 2009, Pedro Manuel Roca Álvarez v Sesa Start España ETT SA, OJ C 141 of 20 June 2009, p. 22.

the principle of equal treatment, which prohibits discrimination on grounds of sex, and is recognised in Article 13 of the Treaty, in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and in Directive 2002/73 of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[181] Paid leave consists of a half-hour reduction in the working day or an hour taken off from work that may be divided into two parts, which is voluntary, paid for by the employer and may be taken until the child is nine months old.

An unweaned child is a child who is still dependent on mother's milk. This questions discrimination towards men and not towards women. According to the Spanish law, the mother is allowed to leave her work to breastfeed the baby, a half-hour to an hour a day. There are no rights for the father to leave work to feed the baby. At first sight the father should not have rights to feed an unweaned child, since the mother is the responsible feeder. However, an unweaned child can also drink bottled mother's milk. If the baby is dependent on mother's milk, it might still be possible that the father leaves the work floor to feed the baby with bottled mother's milk. This might be an option if the father's working place is closer to the baby than the working place of the mother. So, there are situations in which it would be preferable that the father leaves his work for a half-hour. When the baby only drinks powder milk, the baby will be fed by the care-taker of the child-care facility, and not by the mother or the father. There is only the right to leave the working place when the baby drinks mother's milk. The answer to this question however will be answered by the ECJ.

181. OJ L 269/15 of 5 October 2002.

In 1997, article 141 of the Treaty of Amsterdam reiterated the principle of equal pay for male and female workers, but contains also the principle of equal opportunities and treatment of men and women in matters of employment and occupation. This means that a full equality between men and women in working life is guaranteed. Men and women are entitled to the equal opportunities in respect of their employment. For the first time, it is legally ensured that men and women have the right to be appointed for all positions at any level in the company if they possess the necessary qualifications.

Article 141

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not

> prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Another important article of the Treaty of Amsterdam is Article 13, in which it is defined that the Council should take unanimously action to combat discrimination based on sex.[182] This provision resulted in important European directives about the equal treatment of men and women, being the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment, also called the 'Employment Directive' and Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and supply of goods and services, also called the 'Gender Directive'.[183] The Gender Directive does not apply in the field of equal treatment between men and women in matters of employment and occupation and will not be discussed here. Directive 2000/78/EC however does apply to all persons, working in the public and private sector, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismis-

182. Article 13 EC-Treaty, para. 1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

183. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2 December 2000, pp. 16–22 and Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37 of 21 December 2004, p. 37.

sals and pay; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.[184] This directive gives men and women equal rights to access to employment at all levels of the professional hierarchy including promotion. Women should be given equal opportunities to make promotion in a company and climb up to the top-level of the company. In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate.

Directive 2000/78/EC lays down minimum requirements. The Member States are allowed to maintain or introduce more favourable provisions as regards the equal treatment of men and women. The question can be raised whether this means that the Member States may maintain or introduce positive discrimination towards women. This question can be positively answered since Article 141 (4) of the EC-Treaty allows positive discrimination towards women by the Member States.[185] It is defined that EU law does not prevent Member States from maintaining or adopting measures providing for specific advantages to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.[186] Finally, it is worth-mentioning that it is up to the Member States to

184. Art. 3 (1) Directive 2000/78/EC.

185. Cfr. infra, p. 7. So thus the preamble of Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

186. Preamble 22.

provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.[187]

Article 141 (3) of the Treaty of Amsterdam served as the legal basis of Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.[188] This Directive repeals Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Directive 2006/54/EC contains provisions that relate to women in senior positions in companies since Article 14 of this directive prohibits discrimination on grounds of sex in public or private sector in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion. Interesting is that it is defined that an exception to the principle of equal treatment between men and women should be limited to those occupational activities which necessitate the employment of a person of a particular sex by reason of their nature or the context in which they are carried out, provided that the objective sought is legitimate and complies with the

187. Article 4 of Directive 2000/78/EC. Occupational requirements: 1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

188. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204 of 26 July 2006, pp. 23-36.

principle of proportionality.[189] Another interesting evolution is that the EU calls in the preamble of this directive for the promotion of the raising of public awareness at European and national level of wage discrimination and the changing of public attitudes to the greatest possible extent.

As regards gender equality, the Treaty of Lisbon of 2009 has brought some changes. The important provisions about gender equality are inserted in the Treaty on the Functioning of the European Union (TFEU) and are as follows:

Article 2: new in the TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3§3 TEU (ex article 2 TEC)

189. Article 14 Prohibition of discrimination 1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations. 2. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

3.The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

The rights, freedoms It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

Article 6§1 TEU (ex Declaration nr. 23)

1.The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

Article 8 TFEU (ex Article 3(2) TEC)

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 10: new in the TFEU

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 19 TFEU (ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 153 TFEU (ex Article 137 TEC)

With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: ...(i) equality between men and women with regard to labour market opportunities and treatment at work ...

Article 157 TFEU (ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The most significant change is inserted in article 157 of the TFEU (ex article 141 TEC). It is now the task of the European Parliament and the EU Council together and not a privilege of the EU Council alone, to adopt measures to apply the principle of equal opportunities and equal treatment of men and women in matters of employment

and occupation. Unanimity is not longer required, but the adoption of the measures should be taken place alongside the normal legislative procedure, which is since the entry into force of the TFEU, qualified majority. The TFEU also inserted a new article 10 which stipulates that the EU has to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This article is in fact a reiteration of article 8 of the TFEU.

It can be concluded that at European level women have enforceable legal rights to have equal access to all levels of the professional hierarchy. Women have equal rights and opportunities as men to participate in senior management positions. According to European legislation, a man and a woman with similar qualifications and experience have equal rights to access the position of CEO in a company.

5. Why is the European principle of gender equality not effective in corporate governance? Problems encountered.

Women and men have equal rights and opportunities as regards the participation in senior management positions. Equal rights have very little to do with equal participation in the boardroom. In this paragraph the most important problems that prevent women from entering the boardroom will be presented.

5.1 The nature of corporate governance legislation: the law itself is keeping women out of the boardroom

Corporate governance is the system by which companies are directed and controlled.[190] It encompasses both the legal framework surrounding the managerial core of company law and the broader institutional

190. Definition by the Cadbury report, Report of the Committee on the Financial Aspects of Corporate Governance at 20.5.

context in which corporate decision-making takes place.[191] The legal framework as regards corporate governance in the EU contains EU Directives and some Regulations. The most important directives and regulations are:

Directive 2009/109/EC as regards reporting and documentation requirements in the case of mergers and divisions [192];

Directive 2007/63/EC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies[193];

Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies[194];

Directive 2006/68/EC amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital[195];

191. A. Johnston, EC Regulation of Corporate Governance, Cambrigde, Cambridge University Press 2009, p. 1.

192. Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions.

193. Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives 78/855/EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies.

194. Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (14.7.2007).

195. Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital.

Directive 2005/56/EC on cross-border mergers of limited liability companies[196]; Directive 2004/25/EC on takeover bids[197];

Directive 2003/58/EC amending Council Directive 68/151/EEC as regards disclosure requirements in respect of certain types of companies;

Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees[198];

Directive 2009/102/EC in the area of company law on single-member private limited liability companies[199];

Eleventh Council Directive 89/666/EEC concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State[200];

Eighth Council Directive 84/253/EEC on the approval of persons responsible for carrying out the statutory audits of accounting documents[201];

196. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

197. Directive 2004/25/EC of 21.04.2004 on takeover bids.

198. Directive 2003/58/EC of 15.7.2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies; Directive 2001/86/EC of 8.10.2001 supplementing the Statute for a European company with regard to the involvement of employees.

199. Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies.

200. Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.

201. Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents.

Seventh Council Directive 83/349/EEC on consolidated accounts[202];

Sixth Council Directive 82/891/EEC concerning the division of public limited liability companies[203];

Fourth Council Directive 78/660/EEC on the annual accounts of certain types of companies[204];

Third Council Directive 78/855/EEC concerning mergers of public limited liability companies[205];

Second Council Directive 77/91/EEC and Directive 2009/101/EC on coordination of safeguards[206];

Council regulation 2157/2001 on the Statute for a European company (SE)[207] and

202. Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts.

203. Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies.

204. Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies.

205. Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies.

206. Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent and Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent.

207. Council Regulation (EC) 2157/2001 of 8 August 2001 on the Statute for a European company (SE).

Council regulation 2137/85 on the European Economic Interest Grouping (EEIG)[208].

None of these European legislative instruments contain provisions about the female representation in companies. Also non-binding European rules, such as the Action Plan of the Commission on modernising Company law and Enhancing Corporate Governance in the EU of 21 May 2003 do not entail actions as regards female representation in corporate governance.[209] In its 2003 Action Plan, the Commission established the European Corporate Governance Forum to coordinate national corporate governance codes. This Forum will exist in regular high level meetings, chaired by the Commission, and will comprise representatives from Member States, European regulators (including CESR), investors and academics, but gender equality is not a priority of the European Corporate Governance Forum.

In conclusion it can be stated that male dominance is inherent to corporate governance legislation. European corporate governance legislation does not support women in the boardroom. The EU has not issued any recommendations as regards the women in the boardroom and also the Lisbon Strategy 2020 only mentions gender equality briefly and does not include specific measures as regards women in senior management positions.

5.2 Tradition: Under-representation of women in specific sectors

There is an underrepresentation of women in boardrooms in general, but mainly in specific sectors such as engineering, sciences, mining,

208. Council Regulation (EEC) 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

209. Communication from the Commission to the Council and the European Parliament – Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM/2003/0284 final.

transport, mathematics and even in the so-called 'new' industry (the Information Technology (IT) industry). There is the so-called 'leaky pipeline' that carries students from secondary school through university and on to a job in sciences, engineering, transport etc...[210] The pipeline leaks at various stages: students change their minds when applying to universities and select another study area; others begin but change their mind before graduation, some leave the pipeline after graduating when they choose a career. The most interesting feature is that women leak out more often than men, but no one has intentionally decided to filter out women of this stream into a science career. Blickenstaff examined the literature of the last 30 years to find explanations for the absence of women in science. He examines factors such as biology, academic preparation, attitude and early experiences, role models, curriculum materials and design, pedagogy, hostile atmosphere, pressure to fill gender roles and the masculine worldview of science. He suggests that the very nature of science may contribute to the absence of women.

In conclusion it can be stated that many factors, such as the school system, traditions to fulfill certain gender roles and the nature of the industry or science sector itself, contribute to the lack of female participation in the board room of some industries and in science.

5.3 The nature of women

Well qualified women often leave the company before they reach a top level position in the company. The opt-out happens especially when major changes in the private life of women make adaptations of their work schedule necessary, notably when a child is born. After the child is born, women remain the main responsible person in the family to

210. J. C. Blickenstaff, Women and science careers: leaky pipeline or gender filter? 2005, Routlegde Taylor & Francis Ltd. In Gender and Education, vol. 17, no. 4, pp. 369-386.

organise the household and to care for the children.[211] Moreover, the combination of private life and work life is more difficult for women than for men. The birth of a child and the subsequent care of the child makes women leave the pipeline before they reach a position at senior level.

In conclusion it can be stated that pregnant women and mothers are well protected by European legislation. The main problem is that women on the way to the top (or those who already reached top level) opt-out after having had a baby. The father on the contrary intends to work more to obtain a higher income to support his family, which often results in a promotion for the father. If the father gets promoted and has to work longer hours, the mother works less or decides to stay home. Many companies loose talented workforce as women tend to stay at home after having given birth to a child.[212] To prevent the drop-out of women, governments and big companies have elaborated programmes to retain and promote women on their way to senior management positions after having had a child.

5.4 A health issue

According to studies in Sweden, women are more prone to the adverse effects of stress which might lead to a burn-out. Stress is inherent to a position at senior management level. Moreover, women often tend to over perform and work long hours to proof themselves. The pressure

211. Study on non-legislative initiatives for companies to promote gender equality at the workplace on behalf of the European Commission, by the Austrian Institute for SME Research in cooperation with Euracle sprl, European Institute for Managing Diversity, Centre for Creative Leadership Europe and European Network for Social and Economic Research, March 2010, p. 6.

212. Study on non-legislative initiatives for companies to promote gender equality at the workplace on behalf of the European Commission, by the Austrian Institute for SME Research in cooperation with Euracle sprl, European Institute for Managing Diversity, Centre for Creative Leadership Europe and European Network for Social and Economic Research, March 2010, p. 107-107.

on women in the boardroom increases when they are the only women in the boardroom (tokenism). This often under-estimated issue needs to be taken into account when trying to retain women in the company.

6. Possible solutions to improve gender equality in corporate governance

6.1 What can the law do to put women in the boardroom?

6.1.1 At international level

At international level there are general rights that protect all persons from discrimination on grounds of sex. The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Convention No. 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation. Articles 21 and 23 of the Charter of Fundamental Rights of the EU also prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay.

As regards corporate governance issues, the Organisation for Economic Cooperation and Development (OECD) launched the Principles of Corporate Governance in 2004. The OECD prohibits discrimination on grounds of sex as regards employment, but does not stimulate the increase female participation in corporate governance. Although debates about the importance of advancement of women in decision-

making functions in corporations regularly take place, there is no legal basis, such as obligatory quota for women in the board of directors, at international level.

6.1.2 At European level

In Europe, women and men have the same rights to equal access to all levels of the professional hierarchy. This right of equal access and equal opportunities has been granted direct effect by the ECJ, but EU has not included a balanced female participation in its legislation nor recommendations on corporate governance issues.

The Parliament has given many recommendations on gender equality, but not yet on balanced participation of women and men in top positions in companies. To improve gender balance at the top of a company, the Parliament should also issue a Recommendation on balanced participation of men and women in the board room of companies. In this Recommendation the Parliament could recommend that Member States adopt a national policy to increase the number of women on boards, that a clause on balanced participation of men and women in boards should be inserted in national corporate governance codes (CGC) and that companies should draft an annual report about their gender allocation in the board.

Recently, the Commission is considering introducing a quota to tackle gender imbalances in the decision-making bodies of private companies if companies prove incapable of voluntarily adapting their gender balance.[213] To reach this goal, the Commission can use article 19 TFEU or article 157 TFEU as a legal basis to advance gender equality in private companies. Article 19 TFEU creates the possibility to use incentive measures to be applied in the field of anti-discrimination. Incentive

213. EU mulls gender quotas on company boards, www.euractiv.com, 15 July 2010.

measures are designed to support cooperation between Member States by way of for example: (1) promoting exchange of information and best practices on gender issues, (2) offering analysis, monitoring and advice of actions carried out in the Member States as regards the promotion of gender equality in the board room, (3) bringing together and exchanging experience in the Member States as regards women in the boardroom, through experimental pilot projects which will help Member States in developing their gender policies in the light of the lessons learned (4) offering a quantitative and qualitative evaluation of the effects of the Member States gender strategy in corporate governance, including assessment of the effectiveness of the methodology used (5) specific information measures to increase the general awareness of the gender issue in corporate governance.

6.1.3 At national level

In the Member States, a variety of actions have been taken to improve diversity in the boardroom. Many governmental proposals stress the importance of gender diversity in the boardroom. In the United Kingdom (UK), the Higgs report of 2003, commissioned by the British Department of Trade and Industry, argues that diversity could enhance board effectiveness and specifically recommends that firms should draw more actively from professional groups in which women are better represented. Sweden has threatened to make gender diversity a legal requirement if companies do not voluntarily reserve a minimum of 25% of their board seats for female directors.

The 2003 Norwegian corporate governance legislation requires public companies to increase the percentage of women on their boards to 40% or face dissolution, since January 2008. Spain has enacted a law requiring companies to increase the share of female directors to 40% by 2015. The French parliament has recently introduced a bill which would require companies listed on the French stock exchange to have

40% female directors by 2015. Finland's new CGC came into effect in January 2010, and requires all companies listed in Finland to have at least one woman on the board, or explain why they do not. The UK Combined Code on Corporate Governance sets out standards of good practice in relation to issues such as board composition and development, remuneration, accountability and audit and relations with shareholders. This Code is currently under review. Jonathan Rees, the Chair of the Government Equalities Office (the Government Equalities Office is responsible for the Government's overall strategy, legislation, and priorities on equality issues) suggests that the Code should be strengthened along the lines of the Spanish Code of Governance. The phrasing of such a provision could be modeled after the Spanish Code, for example:

"When women directors are few or non-existent, the board should state the reason for this situation and the measures taken to correct is; in particular, the Nominations Committee should take steps to ensure that: (a) the process of filling board vacancies has no implicit bias against women candidates; (b) the company makes a conscious effort to include women with the target profile among the candidates for board places."

At present, Sweden has developed two interesting initiatives to improve gender equality in senior positions in companies in 2009. These are 1) a national steering programme for female board members in private and public enterprises: 'Steering Power' and 2) a new strategy for 'An Equal Labour Market'. The 'Steering Power' has as its purpose to identify and recognise competent women with the talent to become board members in public and private enterprises. An assessment report of this new Strategy will be presented to the Swedish Parliament in 2011.

Also in Austria the Code of Businesses has been amended and contains an obligation for all capital companies to describe in their annual

reports which kind of measures have been taken in order to promote women on boards of management, supervisory boards and in leading positions of the enterprise. Austria also amended the Act on the organisation of Universities and their Studies to improving promotion of women at universities and to strengthen the structure and powers of the internal equality bodies.[214] In Spain progress towards gender equality has been substantial as regards political participation and access to senior positions where the law sets mandatory quotas. The Spanish Minister of Equality underlines that the gender equality has improved a lot, but he remarks that the real reason behind this is that structural problems of the economic crisis affect to a greater extent male-dominated sectors.[215]

An interesting development takes place in The Netherlands, where a new law obliges the employers to take actions against discrimination in their organisation. Discrimination based on gender inequality is regarded as a psychological pressure at work. The Dutch newspaper de Volkskrant announced on 13 September 2010 that the rise of women in the board room of Dutch companies has almost come to an end.[216] A research into 30 leading Dutch companies, conducted by the newspaper itself, shows that in 2008 the amount of women in senior management positions rose with almost 2 percent, but slowed down in 2009 to 0,5 percent. The initiatives which have been taken during recent years to push women to the top of companies have not been very fruitful. One of these initiatives concerns the Charter Talent to the Top designed by the Dutch government in collaboration with 100 companies. The cause of this slow-down is to be found in the recent financial crisis.

214. European Gender Equality Law Review, No 2/2009, p. 32.

215. European Gender Equality Law Review, No 2/2009, p. 94.

216. de Volkskrant of 13 September 2010, p. 1 and 21.

In some countries, such as Belgium, Italy, Romania and Germany, there was almost no interest for gender issues because of several reasons: the economic recession, a paralysed government and serious national budgetary deficits. In France there are some voices that ask for the adoption of an Act allowing better representation of women in councils and boards of private and public companies, in the access to elective professional functions (like the position of judge in Labour courts, or the positions of workers' representatives) and in the structures of trade unions. Some countries, such as Greece and Iceland, stimulate the participation of women in political decision-making.

6.1.4 At business level

There are some big companies that have announced the use of gender quota in the future. Deutsche Telekom is the first German company to apply such gender quota:

Germany's boardrooms have long been a cherished male preserve. But that's about to change at one of the country's biggest companies, Deutsche Telekom, which has just unveiled a radical new plan to fast-track more women into management roles. By 2015, the company has mandated that 30% of its middle and upper management positions be filled by women — the first gender quota to be implemented at one of Germany's top 30 DAX-listed companies. Anne Wenders, a Deutsche Telekom spokesperson, says this is not a "tokenistic gesture aimed at political correctness," but a new way of thinking that could become a model for other German companies. "This is a revolution and it will change the way our company works," she says.[217]

217. 'In Germany, a Quota for Female Managers' in Time of 22 March 2010. Read more: http://www.time.com/time/business/article/0,8599,1974109,00.html#g.

6.1.5 Conclusion

It can be stated that at this moment, the only enforceable legal measures can be found at national level, where some Member States have included a balanced female participation in their national CGC, these are the Finnish CGC in 2008, the Swedish CGC in 2008, the Spanish CGC in 2006 and the German CGC in 2009. Norway has issued legislation according to which companies are required to have at least 33 % to 50 % of each gender depending of the size of the board. The gender gap varies significantly between the different Member States: Sweden, Finland, Spain, Germany and Norway are the leading countries as regards a balanced female participation in senior management positions. Other Member States are still confronted with a large gender gap as regards male and female representation at senior management level.

If the EU wants to reduce this gender gap it should enact European legislation specifically related to female participation in senior management position. The Commission is currently working on legislation introducing quota to tackle gender imbalances in the decision-making bodies of private companies.

A mandatory diversity programme, such as the obligatory quota, remains controversial in many Member States. Member States argue that diversity should be part of the comprehensive form culture and not the duty of one task manager who has to fulfill the quota. The argument against legally enforceable balanced participation is that it contradicts the principle of the free market in which the state is not allowed to regulate how goods, services and labor may be used, priced, or distributed.

6.2 How to break with traditions

There is an underrepresentation of women in boardrooms in general, but mainly in specific sectors such as engineering, sciences, mining, transport, mathematics...

Sweden sets a very good example as how to improve gender equality in corporate governance and other senior positions. One of the goals of Sweden is equal access by women and men to positions of power and influence. At this moment Sweden is the world leader in terms of the amount of women in political decision-making bodies at national, regional and local level.

However, only 3.1% of the board members in large private enterprises are women. The gender distribution in public companies is more balanced with 46% of the seats occupied by women. Women in private enterprises are active in industries such as cleaning, service provisions, health care and education. Men are more often found in the manufacturing, construction, transport and communications industries. This gender division in the business sector also affects the career choices young people make. Therefore, Sweden tries to tackle the gender division problems already at the bottom; this is to say at educational level. In order to break the gender inequality pattern, the Swedish government will bring changes in the whole educational system, from pre-schools to higher education. This has led to some changes; there are 6% more men in health care and 6% more women in the construction industry.

6.3 What about the interface of the combination of pregnancy, giving birth, childcare, family life and women at top level or on their way to the top?

6.3.1 The European legislator

In Europe, there are some directives to protect pregnant employees. Article 2(7) of the Equal Treatment Directive provides as follows:

This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.

Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive.

The Recast Directive 2006/54 ensures the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation i.e. access to employment, including promotion, vocational training, working conditions including pay and occupational social security schemes. Article 2(2) of this directive states that discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85. Article 15 addresses the right of female workers to return to their job or an equivalent post after maternity leave. The Pregnancy and Maternity Directive 92/85 implements measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. This is a minimum standards Directive and Member States can adopt rules providing for more favourable protection of pregnant workers. In 2002, the Parliament and the EU Council took incentive measures in the field of employment with respect to the combination of working and family life.[218] The actions of Member States in the field

218. Decision No 1145/2002/EC of the European Parliament and of the Council of 10 June 2002 on Community incentive measures in the field of employment - Statement by the Commission, OJ L 170, 29.6.2002, p. 1–6.

of employment policy should make efforts to mainstream the principle of gender equality, in particular for men and women in employment and labour markets and to reconciling working life and family life.[219]

It is clear that these European measures are very important, but do not help women obtain seats in the board room.

6.3.2 The national legislator

The Swedish government proposed some interesting measures which could have an appreciable effect on the number of women in top position. At national level, the Swedish government proposes the following measures for women who had had a baby: 1) a gender equality bonus for parents that equally participate in working life, 2) a tax relief for household services to facilitate the combination of private life and work life, 3) the establishment of a working group which analyses these issues, and 4) a questionnaire-based study on gender equality in parenthood. Further the Swedish government will mandate the National Institute for Statistics to conduct a time-use study on how men and women divide their time.

6.3.3 At business level

The most useful measures for women to stay in the board room after having had a child or to be able to combine family and work life are established by the companies itself. Big companies undertake important steps for women on their way to the top to combine family and work life. These measures however are not enforceable. Some initiatives at business level will be set out hereunder. This is not an exhaustive overview of all measures taken by individual companies, but gives a good overview of what companies try to do to make life at the top easier for women.

219. Article 4 of Decision No 1145/2002/EC.

KPMG comes to the conclusion that one of the most important barriers for women to reach senior level, lie in balancing work and family. Therefore KPMG designed a Retention Strategy to retain talented women called My Family Matters.

Microsoft Inc. has also elaborated a Retention Strategy since the company was losing highly qualified women since they did not return to work after giving birth to a child. Therefore Microsoft Inc. indicates a personal mentor for each employee (men and women) on parental leave. The mentor informs the absent employee about current issues at the company. Moreover, the absent employee may keep its company computer, business cell phone, as well as their entry codes to the systems. Further, the company organises 'Stay Connected Breakfast' where men and women on parental leave as well as their personal mentors and managers are invited to informally discuss current developments

Siemens AG uses a Re-entry Concept. Women and men in higher positions on parental leave are offered:

- a workshop which deals with the new role of the employee in the family and with methods to balance job and family.

- close contact is kept with women who are on maternity protection or with persons on parental leave;

- a personal mentor is nominated to support these employees before, during and after parental leave;

- approx. 1 month before the leave is taken a check-up talk is held between the employee, the mentor and the responsible manager after which a personal development plan is then elaborated;

- approx. 4 months before the re-entry, another check up talk is held to clarify the details of re-entry;

- trainings can be taken during parental leave (many trainings are also offered on e-learning basis);

- possibility to work some hours during the leave with flexible timing.

Deutsche Post DHL AG offers a specific return programme to all employees who wish to return to their jobs after having spent time with their families. Already during their absence, these employees are invited to participate in information events and training sessions. Temporary assignments and fill-ins for employees who are on vacation or ill are also possible. Upon return, a specific return seminar informs employees about the company's current direction. Once the employee is back in the job, flexible working time arrangements and assistance in organising child care shall ensure balance of professional and family live.

At Dell Inc. a 'maternity toolkit' has been developed. This toolkit allows managers to understand and communicate effectively with pregnant employees before and during their maternity leave.

IKEA developed a 'parental leave compass' which is also designed to improve the communication between managers and employees before and during, but also after their maternity leave and addresses also men. When an IKEA employee expects a child, he and she is asked by his or her manager when and for how long he and she intends to take parental leave. Men are motivated to take parental leave since the company asks both men and women if they want to take parental leave. Men are motivated to take parental leave at e. g. Assecurazioni Generali s.p.A. or Stormberg AS.

Henkel AG, Microsoft Inc., TUI AG or Siemens AG (Austria) and IKEA have implemented measures to ensure that close contact is kept with their employees on parental leave.

Accenture (UK) Ltd.. organises a Father's Workshop which is aimed at new and expectant fathers. The fathers gain first aid knowledge, hear first hand from a maternity nurse on what to expect, learn what support is available to them and share knowledge and experiences with others.

In conclusion it can be stated that some prominent companies took very interesting measures to retain women on board. These companies' strategies offer excellent ideas for other companies about how to deal with the gender issue in the board room. Also European and national legislators should study and take into account these no-nonsense measures when contemplating legislation about the gender balance in corporate governance.

6.4 What about the health of women: reducing stress

There is no general awareness about the fact that also health is an issue for women to opt out of the race to the top of the company. Some Member States however invest in the health of women in relation to employment issues. The Swedish government established an institute to examine gender differences in work return after illness. Further the government gives a rehabilitation guarantee for women to facilitate work return and examines gender differences in sickness absence. The Spanish government created a women health advisory council.

Women in European offices often leave the company because they do not feel comfortable in the culture of their workplace. Some companies developed instruments to reduce the level of stress for women in senior positions. Deloitte for example uses a three-level approach: (1) the

company will invest in encouraging women to position themselves and also in investigating why some women are reluctant to put themselves forward; (2) the board of the company is responsible for the total, ensuring accountability for the whole at the top level; (3) the process of recruitment, appraisals, promotion and remuneration should be frequently reviewed in order to prevent gender discrimination and unfair treatment.

Another successful instrument of Deloitte to reduce stress is the cross-gender mentoring program, which brings together male partners with senior women on their way to partner level.

While mentoring each other, men have become more sensitive to the issues women face within the company, whereas women have gained a better understanding of the culture and the way business is being done at the top levels. Deloitte also came to the conclusion that women benefit from transparency and shared responsibility. This can be reached through conversations around pace, workload, location/schedule and role. Another solution can be found in providing a mentor for female employees in the board room or e-mentoring to develop management skills, to provide support and guidance and a personal friendship for women in top positions. Finally, there should be more than one woman in the board room. One woman is under too much pressure.

6. Conclusions

The principle of equality between men and women is present in European legislation and consequently in legislation of the Member States. However, this legally enforceable principle of gender equality is not sufficient. Equality rights have nothing to do with equality participation in the board room of companies. Although it has been proven that having three or more women in the board leads to positive results for the company, women still do not reach these senior management

positions because they jump off the ladder to the top or quickly leave the boardroom after entering.

As for now, only some Member States, with Sweden on top, and especially some high-ranking companies take excellent appropriate measures to stimulate women to climb up the ladder and not to drop out if they are confronted with birth, a difficult combination between private and work life or highly stressful events at work.

It is now up to the European legislator to take in-depth and practical measures if Europe wants to have more women in the board room. The Commission is currently contemplating such legislation. The European legislator should be inspired by measures taken by some national governments, especially the Swedish realistic measures and foremost the measures taken by big companies, when mulling over its own legislation as regards gender balance in corporate governance.

These far-reaching measures should be innovative and touch the core of the problems that working women are confronted with. The measures should address problems that do not only concern the legal position of women in a company, but the problems women experience which are a complex combination of psychological, biological, long-established and legal issues. An excellent example of such comprehensive measures, that take into account the complexity of the problems, is the re-entry concept used by Siemens which offers a workshop that deals with methods to balance work and private life; the appointment of a personal mentor and the possibility to work some hours during the leave with flexible timing. These measures should make the re-entry of women (and men) easier.

Further, the EU and national governments should invest in research about the problems of women at the top such as women's health. These studies should result in an overview of legally enforceable far-reaching measures, such as a tax relief for household services to facilitate the

combination of private life and work life that might help women to stay in senior management position or not to drop out before they have reached a senior position.

An obligatory quota programme remains arguable since it contradicts the free market principle.

The Commission could study over a provision in the Spanish Code stating that: "When women directors are few or non-existent, the board should state the reason for this situation and the measures taken to correct it; in particular, the Nominations Committee should take steps to ensure that: (a) the process of filling board vacancies has no implicit bias against women candidates; (b) the company makes a conscious effort to include women with the target profile among the candidates for board places. Or along the Austrian Code of Businesses which contains an obligation for all capital companies to describe in their annual reports which kind of measures have been taken in order to promote women on boards of management, supervisory boards and in leading positions of the enterprise.